87-1575

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Washington "take" Orion's property in violation of the fifth and fourteenth amendments to the United States Constitution by ruling, retroactively and unpredictably in terms of relevant precedent, that Orion's property is subject to a public trust doctrine, which grants the general public a right to use Orion's property for navigation, fishing, and recreation?

2. Did the State, by designating, promoting, and regularly using Orion's property for the Padilla Bay National Estuarine Sanctuary, take Orion's property by invasion in violation of the fifth and fourteenth amendments?

3. Did the Supreme Court of Washington deny Orion minimal constitutional protection under the fifth and fourteenth amendments by refusing to recognize a cause of action for oppressive pre-acquisition conduct?

4. The Supreme Court of Washington twice held that Orion could not obtain a permit to make any economic use of its property. After so holding, did the State Court deny Orion its right to Just Compensation by characterizing the applicable regulations as "safety regulations" and, on that basis, "insulating" the State from Orion's regulatory taking claim?

5. Did the State, under the totality of the circumstances here, permanently and completely take Orion's property in violation of the fifth and fourteenth amendments?

PARTIES TO THE PROCEEDINGS

The Respondents below were The Orion Corporation, a Washington corporation, and The Padilla Bay Associates, a Washington limited partnership.

The Petitioners below were the State of Washington, the Attorney General of the State of Washington, the Washington State Department of Ecology and its Director, the Washington State Department of Game and its Director, the Washington State Department of Fisheries and its Director, the Manager of the Padilla Bay National Estuarine Sanctuary Project, and Skagit County.

The Orion Corporation has no parent or subsidiaries. Its only affiliate is The Padilla Bay Associates.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner The Orion Corporation respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered on December 17, 1987.

OPINIONS BELOW

The decision of the Supreme Court of Washington of which review is sought was entered on December 17, 1987. The decision is reported at 109 Wash. 2d 621, 747 P.2d 1062 (1987), and is printed as Appendix A ("*Orion II*"). The proceedings prior to that opinion were as follows:

In an unreported Order on Motions for Summary Judgment of May 31, 1983, printed as Appendix C, the Superior Court of Washington for Skagit County granted Orion's Summary Judgment Motion to Strike the State's and County's standing and exhaustion defenses. In an interlocutory decision filed on January 11, 1985, reported at 103 Wash. 2d 441, 693 P.2d 1369 (1985), and printed as Appendix B, the Supreme Court of Washington affirmed the Superior Court ("*Orion I*").

On remand the Superior Court entered the following orders: (1) Order Granting Plaintiff's Motion For Summary Judgment On Its Claim That The Defendants Have Taken Its Property By Excessive Regulation; Denying Defendants' Motions For Summary Judgment Regarding This Same Claim; Granting Defendants' Motions For Summary Judgment Dismissing Plaintiff's Equal Protection And Contractual Impairment Claims, entered January 29, 1986, App. D; (2) Order Granting Plaintiffs' Motion Establishing Date Of Taking Not Later Than August 29, 1980, entered March 7, 1986, App. E; (3) Order On Public Trust Doctrine, entered March 7, 1986, App. F; (4) Order Denying Plaintiffs' Motion To Reconsider Order On The Public Trust Doctrine, entered March 25, 1986, App. G; (5) Order Dismissing Claims For Precondemnation Conduct and Physical Invasion, entered March 25, 1986, App. H; (6) Orders On The Measure Of Just Compensation, entered March 25, 1986, Apps. I and J.

Orion seeks review of the December 17, 1987, decision of the Supreme Court of Washington, referred to above, that affirmed in part, and reversed and remanded in part, the judgment of the Superior Court.

JURISDICTION

The Supreme Court of Washington rendered its decision on December 17, 1987, and this petition for certiorari was filed within 90 days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions, the texts of which are annexed to this petition in Appendix K:

U.S. Const. amend. V

U.S. Const. amend XIV, § 1

STATEMENT OF THE CASE

Introduction. In this Statement, The Orion Corporation ("Orion") sets forth the history of Washington's tideland law

generally and Orion's property specifically. Orion does so at some length: the case involves one hundred years of Washington legal history and nearly thirty years of facts.

Orion owns in fee approximately 5,600 acres of tidelands in Padilla Bay, Skagit County, Washington. Padilla Bay Associates, an affiliated partnership owned by Orion shareholders, holds options on approximately 3,500 adjacent acres. Orion began acquiring its tidelands in 1963. At that time, the State of Washington ("State") and Skagit County ("County") promoted an industrial use for Padilla Bay. Orion acquired its tidelands to develop them as a recreational community. By the end of 1969, Orion had nearly completed its acquisition of Padilla Bay tidelands.

Since 1970, the State has prohibited Orion's planned use for its property. During the 1970's, Orion sought viable economic uses for its property. Over the same ten years, however, the State sought to preserve Orion's property in its natural state. Since 1980, Orion has pursued, first by negotiation and then by litigation, Just Compensation for the taking of its property.

Background. At the beginning of 1970, the State announced a temporary "moratorium" on tideland development. Starting in 1971, the State enacted legislation regulating the use of Washington's tide and shore lands. These first regulations, combined with others that followed, denied Orion economic use of its property. As the State Court found in *Orion I*, state, federal, and local officials pursued a "conscious state policy" to preserve Orion's property in its natural state. This policy came to complete fruition in August 1980 in the establishment of the Padilla Bay National Estuarine Sanctuary. As the State's brochures, displays, and advertisements indicate, Padilla Bay, including all of Orion's fee property and Padilla Bay Associates' option property, has been set aside "in perpetuity" as part of the 11,600-acre Sanctuary. *See, e.g.*, State brochure distributed in 1985, App. N.

The State, however, refuses to condemn Orion's property. Accordingly, in 1982 Orion commenced this lawsuit to seek Just Compensation for the taking of its property. In 1985, in *Orion I*,

the State Court held that Orion need not exhaust its administrative remedies because doing so would be a vain and futile act; Orion could not obtain a permit for any economic use of its property. In *Orion II*, the State Court, in rejecting a "ripeness" challenge, reaffirmed that holding. App. A-4.

The State has taken Orion's property, entitling Orion to an award of Just Compensation. The State Court has, however, denied Orion this right by: (1) declaring, contrary to controlling precedent, that Washington has a public trust doctrine and applying it retroactively to defeat Orion's taking claims, and (2) holding that the State Shoreline Management Act, Wash. Rev. Code ch. 90.58 (1987) ("SMA"), and the regulations promulgated pursuant to it are "insulated" from a takings challenge because they are "safety" regulations. These final decisions conflict with this Court's recent decisions on the public trust doctrine and on the Just Compensation clause.

Washington's Settled Policy Favoring Tideland Development. At least by the 1860's, pioneer farmers began diking Washington tidelands. The diked lands around Padilla Bay have been lauded as "the *best* land in the world" and "the finest farms in Washington." D.M. Nesbit, "Tide Marshes of the United States" at E18 (U.S. Dep't of Agriculture, Misc. Special Report No. 7, 1885); "An Illustrated History of Skagit and Snohomish Counties at E1131" (Interstate Publishing Co. 1906) (pagination used in discovery).

The disposition of tidelands became a paramount issue at the Washington Constitutional Convention of 1889.

> Many insisted that the State should reserve title and that the land should never be sold. Others maintained that the best interests of the state demanded that they pass into private ownership, thus becoming a subject of taxation and revenue to the state. The latter theory prevailed, subject to the qualification that the harbor area should never be disposed of.

State v. *Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913). From its initial session, the Washington legislature pursued its

mandate: it invited and encouraged the development of tidelands so that they would be "put to useful purposes." *Id.* This "settled policy" favoring tideland development was set forth and recognized by the courts and State Attorney General. *Boyer* v. *State*, 19 Wash. 2d 134, 140-41, 142 P.2d 250, 254 (1943). In response to this policy, private citizens, as well as the State and other governmental entities, developed tidelands to put them to economic use.

Padilla Bay. "Orion's property in Padilla Bay . . . had originally been sold as unzoned tidelands for commercial development." *Orion I*, App. B-19. The State Court upheld the right to use the State diking statute to dike Padilla Bay. *Jones* v. *Hammer*, 143 Wash. 525, 531, 255 P. 955, 958 (1927).

In the early 1960's, the State supported new plans to develop Padilla Bay. The Skagit County Development Association had been seeking to convince manufacturers to relocate in Skagit County. The Association recognized, however, a lack of suitable industrial sites in the area. The Association identified Padilla Bay as an ideal industrial site on deep water channels. The State enthusiastically endorsed a proposal to industrialize the Bay as "the most outstanding project visualized in the state." It encouraged county residents "to put the plan into action." The County designated a portion of Padilla Bay "industrial." Skagit County Zoning Map, App. M.

Soon after this industrialization proposal was put forth, Orion began acquiring Padilla Bay tidelands. As Washington's Supreme Court wrote:

> Orion acquired this property with a plan to establish a residential Venetian style community, estimated to ultimately have a population of 30,000, with supporting retail, commercial and recreational facilities. Orion completed detailed concept planning and engineering studies to check physical development feasibility. Orion's detailed plans called for a combined dredge and fill operation to create the community.

Orion I, App. B-8. The State later recognized that, absent subsequent shoreline regulation, the project looked feasible and saleable. Transcript of Remarks by D. Rodney Mack, Department of Ecology (May 18, 1979).

Washington's Reversal of Its Tideland Policy. On December 30 and 31, 1969, Governor Dan Evans announced that the State had changed its policy regarding tideland development. The State ostensibly premised its decision on *Wilbour* v. *Gallagher*, 77 Wash. 2d 306, 492 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970). That case, however, involved a lake shoreline, not tidelands, and the State Court gave no impression, by citation or otherwise, that the case overruled the State's 80 years of tideland law. Nonetheless, the State administration imposed a moratorium on tideland law to compel the legislature to enact legislation regulating tidelands.

Regulations and Regulatory Actions to Preserve Padilla Bay. In 1971, the State enacted the Shoreline Management Act, Wash. Rev. Code ch. 90.58 ("SMA"). The SMA specifically names Padilla Bay as one of five "shoreline[s] of state-wide significance." *Id.* 90.58.030(2)(e)(ii)(E). As the State Court wrote:

> As will become evident, the State has made a policy choice for Padilla Bay that accords with the [SMA's] . . . use preferences: to recognize and protect the statewide interest, preserve the natural character of the bay, and protect its resources and ecology.

Orion I, App. B-11. Numerous regulations were promulgated pursuant to the SMA. In one such regulation, the State Department of Ecology requires local zoning bodies to "[l]eave undeveloped those areas which contain a unique or fragile natural resource." Wash. Admin. Code R. § 173-16-040(5)(d)(i) (1986). As the State Court later wrote: "There is no doubt that Padilla Bay is a unique and fragile natural resource area." *Orion I*, App. B-42. Government officials indicated that development of Padilla Bay would be strongly opposed. *Id.* at B-13.

The County then, in 1976, enacted the Skagit County Shoreline Management Master Program ("County Master Program"). When combined with other regulations, it allowed only "less intensive, nonstructural and nonextractive recreational activities" on Orion's property. *Id.* at B-16. Also in 1976, the Washington State Coastal Zone Management Program designated Orion's property as an "area of particular concern." The Program stated: "[t]he estuary of the Skagit River [Padilla Bay] is the most diverse, least disturbed, and most biologically productive of all the major estuaries on Puget Sound." *Id.* at B-18.

Orion sought other economic uses for its property, but found none. For example, it considered a duck hunting club on its land. The State informed Orion that the State could simply shut down the hunting season on Padilla Bay.

Orion also sought a buyer for the property. The United States Fish & Wildlife Service ("FWS") was one potential buyer. The FWS retained the State Department of Game from 1977 through 1979 to do a major biological study to determine whether the FWS should acquire Orion's property for a refuge program. Prior to publication of the Department of Game's report, however, the Department of Ecology directed that the report be "quashed because it suggested values that would have made acquisition impossible." Affidavit of Clinton W. Morrow, sworn June 13, 1985, ¶¶ 2-5, App. L. The FWS showed no further interest in acquiring Orion's property.

In response to a previous State request for federal funds to acquire Orion's property, W. H. Hallauer, the director of the Department of Ecology, wrote to then Governor Dixy Lee Ray:

> The sense of the federal position is that they see no point in paying for the property as it is frozen into non-development posture by the effect of CZM [Coastal Zone Management] and the Washington State Shoreline Act.
>
> This attitude reflects a taking of unfair advantage by government. The owners have been deprived of property

> rights by government action — in fairness, there should be an attempt to compromise on the "taking" issue.

Letter dated February 15, 1978, set forth in *Orion I*, App. B-23.

> **The Padilla Bay National Estuarine Sanctuary.**
>
> As Orion investigated means of developing its Padilla Bay property, local and state agencies continued to look into methods of protecting the bay in its natural state. The result of those efforts is the final and determinative land use program that directly impacts Orion's property: the creation of the Padilla Bay Estuarine Sanctuary. Creation of this sanctuary is direct evidence of the State's conclusion and plan that the estuary of Padilla Bay remain undeveloped.

Orion I, App. B-23-24. *Orion I* described the Sanctuary as follows:

> The Padilla Bay Estuarine Sanctuary steering committee was formed to guide the creation of the sanctuary and was composed of officials from local and state agencies. The steering committee looked at several sites as possible sanctuaries before selecting Padilla Bay. The ownership pattern of the bay made it easier to acquire than any other areas where ownership was "incredibly fragmented." When the sanctuary was in the planning stages, Ecology's assistant director stated that acquisiton of the Orion holding would be the first order of business. . . .
>
> In July of 1980, the final environmental impact statement (hereinafter EIS) for the proposed estuarine sanctuary grant was filed with the Department of Commerce. This EIS identified the proposed sanctuary as comprising approximately 11,000 acres of Padilla Bay. All of Orion's property holdings were included within the proposed sanctuary boundaries.

The National Oceanic and Atmospheric Administration which oversees the federal Coastal Zone Management Act of 1972, issued regulations for the administration of estuarine sanctuaries. The purpose of the program is to create *natural field laboratories* in which to gather data and make studies of the natural and human processes occurring within the estuaries of the coastal zone. The *primary use* of estuarine sanctuaries shall be for *research and educational purposes*. [Court's italics] 15 C.F.R. § 921.3 (1984). While multiple uses are possible in estuarine sanctuaries, such compatible uses are generally low intensity recreation, fishing, hunting and wildlife observation. 15 C.F.R. § 921.5(a) (1984). Moreover,

> (b) There shall be no effort to balance or optimize uses of an estuarine sanctuary on economic or other bases. *All additional uses of the sanctuary are clearly secondary to the primary purpose and uses, which are long-term maintenance of the ecosystem for scientific and educational uses.* Non-compatible uses, including those uses which would cause significant *short or long-term ecological change* or would otherwise detract from or restrict the use of the sanctuary as a natural field laboratory, *will be prohibited.*

[Court's italics] 15 C.F.R. § 921.5(b) (1984). Lastly, management of estuarine sanctuaries is the responsibility of the State or its agent. Any management program, however, must be in conformance with the federal regulations and guidelines. 15 C.F.R. § 921.30 (1984). Thus, the state management program *must* ensure *"long-term maintenance of the ecosystem for scientific and educational uses."*

The Padilla Bay Estuarine Sanctuary officially came into being August 29, 1980. The federal government granted $1.2 million to the State for property acquisition and construction of an interpretative center on the

11,600-acre site. Wash. Dep't of Ecology, *Shoreline/Coastal Zone Management*, vol. 5, No. 3 (Sept. 1980). The interpretative center was dedicated in September of 1982. State maps at the center depict the 11,600-acre sanctuary as including all 9,600 acres controlled by Orion. These maps included Orion's property holdings within the proposed sanctuary despite the fact Orion has not been a "willing seller."

Orion I, App. B-24-25, 27-30.

The State believed that the Sanctuary would cost more than it was willing to spend. The State knew "that potential identified funding sources are less than what will be required to pay the 'full' value amount." Padilla Bay Estuary Sanctuary Financial Funding Sources (draft) at 2. To avoid paying the " 'full' value amount," the State decided not to condemn the property, but rather to acquire the property only from "willing sellers."

To establish a basis for the State's offer, the State hired John B. Willis to appraise the property. Mr. Willis, as the previous land acquisition supervisor for the State Department of Game, had sought for years to preserve Orion's property in its natural state. *See, e.g.*, Letter from John B. Willis to C.W. Morrow (Mar. 8, 1977); Letter from John B. Willis to Kenneth Fanning (July 26, 1974). In that capacity, he had indicated that he viewed the property as worthless because government regulations prevented any use of it. Willis appraised the "fair market" value of Orion's property as $80 per acre. Orion refused to sell.

Proceedings Below and the Federal Questions Presented. On August 31, 1982, Orion commenced this action in the Superior Court of Washington for Skagit County. Orion alleged that the State and the County had taken Orion's property by invasion for the Sanctuary, by oppressive pre-acquisition conduct, and by excessive regulation in violation of the fifth and fourteenth amendments to the United States Constitution. Orion also claimed that the defendants had violated Orion's due process and equal protection rights, impaired the obligations contained in the deed from the State, and violated 42 U.S.C. § 1983. Orion sought damages. Defendants moved for summary judgment, arguing

principally that Orion had failed to exhaust administrative remedies. The trial court denied defendants' motions, holding that Orion had proven conclusively by uncontroverted facts that pursuing administrative remedies would be futile and impractical. The State Court granted discretionary review, affirmed, and remanded for a hearing on the merits. *Orion I*, App. B-49. On remand, the trial court entered the orders set forth above in the section entitled "Opinions Below." All parties appealed.

At the outset, the State Court, in *Orion II*, rejected defendants' "ripeness" challenge. In doing so, the court reaffirmed its previous holding that Orion could not obtain a permit to make any reasonably profitable use of its property. *Orion II*, App. A-4. The Padilla Bay Associates was dismissed because its options were held "not a sufficiently strong property interest to support its regulatory taking claim." *Id.*, at A-35. Skagit County, because it was held to be the State's agent, was also dismissed. *Id.*, at A-51. The Court then addressed the merits of the other issues before it. The Court held, in part, as follows:

(1) that Orion's property, though privately owned, is subject to a public trust, allowing the public to use Orion's property for navigation, fisheries, recreation, and other public needs, as modern science identifies them, and that Orion may not substantially interfere with such public uses, *id.* at A-38-39, 43-45;

(2) that the defendants did not, in establishing and operating the Padilla Bay National Estuarine Sanctuary and in promoting it as including all of Orion's property, take Orion's property by invasion, *id.* at A-115;

(3) that the State Court will recognize no cause of action to afford Orion relief against oppressive pre-acquisition conduct, *id.* at A-118; and

(4) that the State Shoreline Management Act, Wash. Rev. Code ch. 90.58 (1987), and regulations promulgated pursuant to it, are insulated from a takings challenge because they are "safety" regulations, *id.* at A-91-92.

All of these decisions are final, and all of them are inconsistent with, and repugnant to, the taking and due process clauses of

the fifth and fourteenth amendments to the United States Constitution, as interpreted by this Court and the lower federal courts. These unconstitutional decisions of the State Supreme Court cannot be cured through any further proceeding in the State trial court. Thus, any such proceeding would result in more years of economic waste and further delay and denial of justice.

REASONS FOR GRANTING THE WRIT

1. IN ORION II, THE STATE COURT RETROACTIVELY ADOPTED A PUBLIC TRUST DOCTRINE, ABOLISHING TIDELAND RIGHTS THAT HAD EXISTED SINCE STATEHOOD. THIS SUDDEN CHANGE IN THE LAW, UNPREDICTABLE IN TERMS OF THE RELEVANT PRECEDENTS, HAS EFFECTED AN UNCONSTITUTIONAL TAKING OF ORION'S PROPERTY.

(a) *Introduction.* On February 23, 1988, this Court decided *Phillips Petroleum Company* v. *Mississippi*, 56 U.S.L.W. 4143 (U.S. Feb. 23, 1988) (No. 86-870). In a five-to-three decision, this Court relied on the public trust doctrine to affirm a judgment quieting title to property in persons leasing from the State as against persons claiming ownership under pre-statehood grants. *Id.* at 4145, 4147, 4148. Justice O'Connor, joined by Justices Stevens and Scalia, dissented: "the Court today announces a rule that will disrupt the settled expectations of landowners not only in Mississippi but in every coastal state." *Id.* at 4148. The majority responded:

> [E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy.
>
> Consequently, our ruling today will not upset titles in all coastal states. . . . Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here.

Id. at 4147. This Court relied in part on *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). In *Hughes*, Justice Stewart wrote that "state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined." 389 U.S. at 296. He reasoned that the Court could not resolve the federal taking question without first deciding who owned the seashore accretions at issue there.

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. *But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.* Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

Id. at 296-97 (citations omitted; emphasis added). This Court there reversed the Washington State Supreme Court.

In *Orion II*, the Supreme Court of Washington announced that Washington has, and has always had, a public trust doctrine. The Court is wrong. Washington relinquished its public trust claim nearly one hundred years ago. In *Orion II*, the Court disregarded its own explicit and controlling precedent. *Orion II*, if allowed to stand, would suddenly and unpredictably grant the public the right to use Orion's property, and all other Washington tidelands held in private ownership, for navigation, fisheries, recreation, and other public needs as modern science is able to identify them. *Orion II*, App. A-43, 44. This decision, first, takes Orion's property by invading, or inviting the public to invade, that property. Second, it defeats Orion's taking claims "by the simple device of asserting retroactively that the property [rights] it has

taken never existed at all." *See Hughes* v. *Washington*, 389 U.S. at 296-97.

Correspondingly, too, in *Orion II*, the Court concluded that Orion had no reasonable investment-backed expectations for its property because the public trust doctrine barred Orion's expected use: dredge and fill operations, primarily for its planned recreational community. *Orion II*, App. A-104. If *Orion II* is allowed to stand, the reasonableness of the expectations of all tideland owners, and all owners of other property subject to the doctrine, will always be viewed from hindsight. And "modern science," not the Constitution, will provide the lens.

Whether *Orion II* "worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." *Hughes*, 389 U.S. at 297. To tideland law in Washington prior to *Orion II*, we now turn.

(b) *Tideland Law in Washington Prior to Orion II.* At the Washington Constitutional Convention, the members debated whether to reserve tidelands to the State forever or to convey them into private ownership, thereby making them a subject of taxation and revenue to the State. The latter theory prevailed, "subject to the qualification that the harbor area should never be disposed of." *State* v. *Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913). Upon becoming a State, Washington declared in its Constitution its ownership of the tidelands, shorelands, and bedlands of navigable waters within its borders:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes . . . .

Article 17, Section 1.

As the owner of Washington's tidelands under Article 17, Section 1, the State could then, as a matter of State law, convey tidelands to private parties, vesting in grantees absolute fee simple title to such tidelands, subject only to the limitations in the

deed conveying ownership. *E.g.*, *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 775-76, 505 P.2d 457, 461 (1973).

(i) No Public Trust in Private Tidelands. In *Puget Mill Co.* v. *State*, 93 Wash. 128, 160 P. 310 (1916), the public trust issue was presented squarely by the Port of Seattle, the City of Seattle, and King County, with respect to property conveyed by the State to private owners. These parties argued that Washington's tide and shore lands are held:

> [I]n trust for the people of the state for the use of navigation and commerce, and for that reason they are not subject to disposition so as to vest absolute title thereto in private parties.

Id. at 134, 160 P. at 313. The State Supreme Court answered:

> [T]his contention cannot be sustained in the light of the history of the state's policy since admission to the Union and the decisions of this court. . . . *Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form* as these deeds are, upon which are rested the titles of the plaintiffs. *The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands.*

Id. at 134-36, 160 P. at 313, emphasis by Court in *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 775-76, 505 P.2d at 461.

Orion II ignored this controlling authority.

(ii) Tideland Sales Made to Promote the Public Interest. The State Court has repeatedly held that Washington's decision to dispose of its tidelands in absolute fee simple interest did not impair, but rather promoted, the public interest, and that Washington was free as a matter of local law to make such sales. *E.g.*, *Palmer* v. *Peterson*, 56 Wash. 74, 76, 105 P. 179, 180 (1909); *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 775-76, 505

P.2d at 460-61; *State* v. *Sturtevant*, 76 Wash. at 171, 135 P. at 1040.

Palmer v. *Peterson* was responding directly to *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387 (1892), the decision most often cited in favor of the public trust doctrine:

> The conveyance by the state of tidelands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states.

56 Wash. at 74, 105 P. at 180.

This Court subsequently affirmed the right of Washington, as a matter of state law, to convey its tidelands for improvement or any other purpose.

> The State, being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands, either to grant with them rights in the enjoining water area or to completely withhold all such rights.

Port of Seattle v. *Oregon & W.R.*, 255 U.S. 56, 63 (1921).

(iii) Exclusive Possession and Control. The right to exclude others from one's property is perhaps the most valuable property right. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979). In *Orion II*, the Washington Supreme Court now concludes that Orion's right to exclude others "remains unaffected." App. A-102. The Court contradicts itself. By holding, in the same decision, that the public has the right to navigate, fish, and recreate on Orion's private tidelands, *id.* at A-45, the Court has of course taken away Orion's right to exclude others.

Citing *Wilbour* v. *Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970), the Court states: "We have had occasion to extend the [public trust] doctrine beyond navigational and commercial fishing rights to include 'incidental rights of fishing, boating, swimming, water skiing, and other

related recreational purposes . . . ." *Orion II*, App. A-44. The Court fails to mention, however, that it had previously decided that *Wilbour* v. *Gallagher* has no bearing on tideland law in Washington:

> As [*Wilbour*] will reveal, none of the cases cited herein pertaining to the legal status of tidelands deeded to private individuals by the state were considered pertinent to the question before the court in that case. The obvious reason is that such tidelands, as we have heretofore pointed out, have never been classified by the state as navigable waters, but rather have been treated as land.

Harris v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 785-86; 505 P.2d at 466. The Court in *Harris* also pointed out:

> The legislature has recognized that the reservation of an easement in tidelands, in favor of the public, when such tidelands are sold by the state, requires an express provision in the deed. *See* RCW 47.12.020.

81 Wash. 2d at 775 n.5, 505 P.2d at 460 n.5.

Harris confirms that, before *Orion II*, a Washington tideland owner had the right to exclude others. Before *Orion II*, an owner of private tidelands was entitled to exclusive possession, control, and enjoyment of the property. *Palmer* v. *Peterson*, 56 Wash. 74, 75-76, 105 P. 179, 180 (1909). In *Palmer*, the tideland owner sought damages and an injunction to restrain the defendants from entering on or passing over the tidelands. The defendants claimed a right of navigation. The State Court responded:

> It is lastly contended that inasmuch as the tidelands in controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. *The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted*, if such a grant was within the competency of the state, and that

> such a grant was within the competency of the state cannot, at this late date, be controverted. The nature of the state's title to tidelands has so often been considered by this Court, and by the Supreme Court of the United States, that the question should be considered at rest.

Id. (emphasis added).

In the case at bar, the County argued, however, that Orion's tidelands were a "commons" available to the general public. Before *Orion II*, the State Court had rejected this argument. To permit others to use tidelands conveyed in absolute fee simple,

> [I]t is plain, would be to make public and practically destroy property of untold value that has been, up to this time, supposed to be susceptible of private ownership; in fact such a rule would open to the commons all of the immense bodies of tide and shore lands which the state has conveyed to individuals and which is now held as private property.

Lownsdale v. *Grays Harbor Boom Co.*, 54 Wash. 542, 551, 103 P. 833, 837 (1909). Now, *Orion II* has made tidelands such as Orion's into a vast commons for public navigation, fishing, boating, and all other such uses.

(iv) The Right to Develop Tidelands. Before *Orion II*, Washington tideland owners had the right to develop their tidelands. From its first session, the Washington Legislature has invited and encouraged the development of tidelands. *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 776, 505 P.2d at 460.

> Throughout the period of years involved in this matter, it had been the policy of this state and the practice of its commissioner of public lands to encourage the improvement and development of state tidelands by private capital and industry.

Boyer v. *State*, 19 Wash. 2d at 134, 140, 142 P.2d 250, 254 (1943).

The State Court recognized in *Orion I* that Orion's tidelands had originally been sold for commercial development purposes,

App. B-19, and in *Jones* v. *Hammer*, 143 Wash. 525, 530-31, 255 P. 955, 958 (1927), had upheld the right to dike Padilla Bay. As discussed in the Statement of the Case, *supra*, the State and County, in the early 1960's, encouraged the industrialization of Padilla Bay. The County zoned part of the Bay "industrial" and left the rest unzoned. *See* App. M.

This Court has itself recognized that a Washington tideland owner has historically had the right to dike and fill his tidelands. *See Port of Seattle* v. *Oregon & W.R.*, 255 U.S. 56, 62-63 (1921). *Orion II* took away such rights from Orion and other Washington tideland owners while bestowing on the general public virtually unlimited use of these lands.

(c) *Orion II: Its "Precedent" for a Public Trust.* In *Orion II*, the State Court "held that a public trust has always existed in Washington." App. A-38. The Court actually credits its decision in *Caminiti* v. *Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) for this holding. The Court claimed that, because of *Caminiti*, "Orion's argument [against such a trust on private lands] is no longer tenable." *Orion II*, App. A-38. It is *Caminiti*, however, that is untenable, certainly as applied to Washington's private tidelands.

In *Caminiti*, petitioners commenced an action against the Commissioner of Public Lands, as the head of the State Department of Natural Resources (the "State DNR"). The Court took the action under its original jurisdiction on agreed facts. Petitioners asked the Court to declare unconstitutional a state statute allowing the owners of residential property abutting *state-owned* tidelands and shorelands to install and maintain private recreational docks on such state lands without payment of lease fees to the State. 107 Wash. 2d at 663, 732 P.2d at 991 (emphasis added).

Petitioners complained that the elimination of lease fees might influence some owners to build new docks on public lands, thereby interfering with the public's use of "these public aquatic lands and waters." *Id.* at 665, 732 P.2d at 992. In short, the action did not address, nor require the court to address, whether the public could use Washington's *privately owned* tidelands under a

public trust. The State Court's entire discussion of a public trust over private tidelands is, accordingly, dicta.

In *Caminiti*, the State Court relied on *Wilbour* v. *Gallagher*, *supra*, and *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 499, 64 P. 735 (1901). *Caminiti*, 107 Wash. 2d at 667, 732 P.2d at 993. In 1973, the State Court distinguished *Wilbour* as inapplicable to tidelands. *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 785-86, 505 P.2d at 466. Thus, the Court's reliance on *Wilbour* in *Caminiti* is misplaced.

Caminiti quotes extensively from *New Whatcom*, first, to define the public trust as a matter of English common law; second, to establish that the State of Washington had declared its ownership of the beds of navigable waters; and third, to set forth the proposition that the public has an inalienable easement in navigable waters. 107 Wash. 2d at 667-68, 732 P.2d at 993.

New Whatcom, however, on its facts, has no bearing here. It was neither a tideland case nor a case addressing navigability, but rather a case recognizing riparian rights in the water of a small non-navigable stream. The *New Whatcom* Court distinguished tideland cases by referring to *Eisenbach* v. *Hatfield*, 2 Wash. 236, 26 P. 539 (1891), which rejected riparian rights over tidelands. *New Whatcom* "conced[es] that by art. 17, § 1, of the Constitution, absolute ownership is now in the state, so that the state can dispose of the waters as well as the soil . . . ." 24 Wash. at 503, 64 P. at 738-39.

Caminiti incorrectly relies on *New Whatcom* as establishing an inalienable easement over Washington's tidelands. *New Whatcom* did not do so. The language that *Caminiti* seized upon was merely part of a recitation of law from another jurisdiction, and the language addressed riparian rights in lakes, which are not at issue here. If *New Whatcom* had adopted such an easement, it would have been overruled by subsequent decisions of the State Court. For example, in *Palmer* v. *Peterson*, discussed above, the Court expressly rejected a claimed right of navigation over private tidelands. 56 Wash. at 75-76, 105 P. at 179-80. Also, as discussed above, as recently as 1973, the State Court wrote that,

by statute, the reservation of a public easement over private tidelands requires an express provision in the deed. *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d at 775 n.5, 505 P.2d at 460 n.5. Thus, the holding in *Caminiti* was based on inapplicable or overruled authority.

Caminiti rests throughout on a distinction drawn between a private property interest and a public authority interest. The second interest, under this analysis, represents the public trust. According to *Caminiti*, this trust, as opposed to bare legal title, always remains in the State. 107 Wash. 2d at 668-69, 732 P.2d at 994. As discussed above, however, both the State Court and then this Court held that the public trust doctrine did not bar Washington from conveying its tidelands and the rights in the water over them. *Port of Seattle* v. *Oregon & W.R.*, 255 U.S. at 63; *Palmer* v. *Peterson*, 56 Wash. at 76, 105 P. at 180.

Most recently, *Caminiti*'s dictum that a State can never relinquish its public trust claim has been held not to be the law of the land in *Phillips Petroleum Company*, *supra*. States may, in whole or in part, relinquish or abandon their public trust claims. 56 U.S.L.W. at 4147.

Based on the foregoing, it can only be concluded that the public trust holding in *Orion II* (and its reliance upon the dicta in *Caminiti*) "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents." *See Hughes* v. *Washington*, 389 U.S. at 296-97. *Orion II* takes Orion's private tidelands and all other private Washington tidelands for a vast public commons. At minimum, it takes a broad and expanding easement over all such lands, so broad as to swallow wholly the rights of ownership. Only "modern science's ability to identify the public's need" limits the public servitude placed on Washington's private tidelands. *Orion II* serves to defeat Orion's other taking claims by "asserting retroactively that the property [rights] it has taken never existed at all." The State Court has ruled finally on these issues, forever denying Orion Just Compensation in the courts. Accordingly, this petition should be granted.

2. THE STATE COURT'S DECISION THAT NO TAKING BY INVASION HAS OCCURRED CONFLICTS WITH DECISIONS OF THIS COURT.

Where the government invades private property, its action constitutes a *per se* taking; no further analysis is necessary. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, this Court stated that Professor Michelman, an expert on taking issues, had "accurately summarized" the cases regarding physical invasion and quoted him as follows:

> At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted).

Id. at 427 n.5. Orion's property, when acquired, was private. Since 1980, the State has invaded that property for the Sanctuary. In *Orion II*, the State Court held that the public may also invade Orion's property under the public trust doctrine.

(a) *The Sanctuary: A "Natural Field Laboratory" on Orion's Property.* The State has invaded Orion's property for the Sanctuary in the traditional sense of physically entering the property and by inviting others to do so. Even more importantly,

the State "regularly uses" the property for the "public enterprise" of a "natural field laboratory." Furthermore, the State — by brochures, maps, press releases, agency newsletters and otherwise — represents Orion's property as part of the 11,600-acre Sanctuary. By such representations, the State does more than invite the public to Orion's property — it claims title. And the State does so despite Orion's rejection, seven years ago, of the State's offer to buy the property for the Sanctuary.

(b) *The Public Trust: The State Court Makes Washington's Private Tidelands a Vast Commons Open to the Public.* The State Court, in holding that Orion's private tidelands are now open to the public under the public trust doctrine, has taken Orion's property, or at least an easement in it, by invasion. In *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), this Court rejected the Army Corps of Engineers' attempt to extend public access to a privately owned marina through invocation of the navigational servitude.

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 179-80 (footnote omitted). Thus, this Court's decisions dictate that Orion is entitled to Just Compensation for the judicial taking of its property.

3. THE STATE COURT'S DECISION THAT NO CAUSE OF ACTION EXISTS FOR A TAKING BY OPPRESSIVE PRE-ACQUISITION CONDUCT DISREGARDS FEDERAL AUTHORITY.

In *Orion II*, the State Court refused to recognize a cause of action for a taking by oppressive pre-acquisition conduct. App. A-118. The U.S. Claims Court, however, recognizes the cause of action, and Orion brought its action under both the Washington and United States Constitutions. *See Althaus* v. *United States*, 7 Cl. Ct. 688 (1985); *Beneson* v. *United States*, 548 F.2d 939 (Ct. Cl. 1977); and *Drakes Bay Land Co.* v. *United States*, 424 F.2d 574 (Ct. Cl. 1970). Accordingly, the State Court failed to provide the minimum protection of the federal constitution.

In *Althaus*, *Beneson*, and *Drakes Bay*, the Claims Court held that the government acts, when considered in their totality, effected complete and permanent takings of property. In *Althaus*, the court held that the cumulative effect of the acts resulted in a taking not later than October 3, 1980, when the government issued its final land acquisition plan. The acquisition plan identified the tracts to be acquired and the strategies to be utilized if a landowner sought to use his property in a manner inconsistent with the government's plans. The National Parks Service believed it could rely on local zoning to control private uses.

The court noted that the widespread publicity surrounding the government's plan made it unlikely that any private investor, other than a speculator, would seriously consider purchasing the property, and it rejected "the idea that the fifth amendment can be avoided by forcing citizens to sell their property to speculators at a fraction of its value." 7 Cl. Ct. at 695.

When the Sanctuary was officially declared on August 29, 1980, Orion was in the same position as the *Althaus* plaintiffs:

> [A]t least since the final land acquisition plan of October 3, 1980, was issued, the event the court views as the consummation and date of the taking, plaintiffs were frozen in place. The significance of this plan is that it draws together and, in effect, ratifies what had occurred to that date in the development of the park and projects

> no change, or expectation for change, in the future. It memorializes the status of plaintiffs' properties in a public document and confirms the restrictions on their use and the likely response if the restrictions were transgressed. Issuance of the document was the climactic event in the progressive taking of the properties in this case. Whatever the debate over the actionability of events and acts, individually or cumulatively, before October 3, 1980, the court finds any taking was complete by then. Thereafter, as in *Drakes Bay*, they could be dealt with by the government at its pleasure. It retained an arsenal of weapons to deter any attempt to use the property other than as if it were parkland.

Id. at 695-96 (citations and footnote omitted).

The State has employed the same overbearing approach in this case. The State recognized that its regulations left Orion with no economic use for its property, and believed it could force Orion to become a "willing seller" at its price. The State's bargaining posture was best summarized in the State Department of Ecology discussion paper addressing the State's position with regard to acquiring Orion's property for the Sanctuary: "At this time in our negotiation, Orion should understand the fiscal constraints under which we operate and realize that although State funds are limited we may be the only 'cash on the barrel head purchasers available.'" Discussion Paper for the Purpose of Determining a Position the State can Take in Order to Proceed with the Sanctuary Real Property Acquisition Program, Specifically, the Orion Corporation Holdings (July 20, 1981).

4. THE STATE COURT'S "INSULATION" DOCTRINE DENIES A PROPERTY OWNER JUST COMPENSATION FOR A REGULATORY TAKING

This Court has consistently held that a landowner alleging a taking by excessive regulation must establish that the application of the regulations to his property denies him "economically viable use of his land." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *see also Keystone Bituminous Coal Association* v. *DeBenedictis*, ____ U.S. ____, 107 S. Ct. 1232, 1242 (1987).

Orion has met that burden. The State Court held, as a matter of state law, that Orion need not apply for a permit or otherwise exhaust its administrative remedies "because under the regulatory scheme, Orion could not obtain a permit to make any reasonably profitable use of its property." *Orion II*, App. A-91, 92. Accordingly, Orion's property has been taken.

In *First English Evangelical Lutheran Church* v. *Los Angeles County*, ____ U.S. ____, 107 S. Ct. 2378 (1987), this Court held that "where the Government's activities have already worked a taking of all use of property, no subsequent action by the Government can relieve it of the duty to pay compensation for the period during which the taking was effective." The Washington Supreme Court has failed to follow this decision.

First, the State Court held that the SMA and the County Master Program were "insulated" from a takings challenge because they were, in the Court's view, "safety regulations." App. A-91-92. The Court relied on *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra*, for the proposition that:

> [E]xercises of the police power cannot be characterized as a compensable taking whenever the State imposes land use restrictions in order to safeguard the "public interest in health, the environment, and the physical integrity of the area." *Keystone Coal Ass'n*, 97 L. Ed. 2d at 490.

Orion II, App. A-76-77. *Keystone*, however, in holding that a Pennsylvania mining subsidence statute did not effect a taking, relied upon the Government's authority to exercise "its police power to abate activity akin to public nuisance." *Keystone*, 107 S. Ct. at 1243. In the instant case, the State does not seek to abate a public nuisance, but rather to provide a public benefit by preserving Orion's property in its natural state.

Chief Justice Rehnquist explained the narrow scope of the "nuisance exception" in his dissent in *Keystone*.

> [O]ur cases involving the "nuisance" rationale have involved at least two narrow principles. First, nuisance regulations exempted from the Fifth Amendment have

> rested on discrete and narrow purposes. . . . Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.

Keystone, 107 S. Ct. at 1256-57 (citations omitted). The State Court ruled otherwise in *Orion II*. The "insulation" doctrine announced in *Orion II* permits the State to deprive an owner of all economic use without the payment of compensation.

Second, the State Court fails to follow *First English* by concluding that the denial of all economic use does not constitute a taking if there is a possibility "of realizing a fair market value through a sale of the property to a nongovernmental buyer." *Orion II*, App. A-103. The Court reasoned that, even though Orion has no economic use of its property, it still retains "fundamental attributes of ownership," including the right to use its property for education, research, and nonintensive recreation. *Id.* at A-101-102. Orion also allegedly retains the right to dispose of its property and, most remarkably, the right to exclude others. *Id.* at A-102. As noted earlier, under the Court's retroactive public trust decision, Orion no longer retains even the right to exclude others.

The State Court has, in effect, announced a new procedural prerequisite to maintaining a taking claim: The landowner must establish that there is no private market for economically useless property. For this proposition, the Court relied upon *Florida Rock Industries, Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986). There, the plaintiff alleged a taking of its property based on the Army Corps of Engineers' denial of a mining permit. The trial court disregarded the testimony of a government witness which, if considered and believed, established the existence of a private market in which the owner could obtain "a solid and adequate fair market value." *Id.* at 903. If the existence of a nongovernmental market could defeat a taking claim, *Florida*

Rock makes clear that it is the government's burden, not the landowner's, to establish the existence of such a market.

The evidence in the record indicates that there was a "nongovernmental" buyer, The Nature Conservancy ("TNC"), interested in the property, and that the TNC was able to purchase some of the Sanctuary property *below* its State-appraised fair market value.

> As you know, the TNC is assisting governmental agencies with the acquisition of real property. TNC has purchased 1,695.5 acres of 2nd class tidelands identified as the Bailey and Waters property in the WDOE real property appraisal dated 15 September 1979 and the Sanctuary FEIS (July 1980, page iii). . . . The tidelands are located in the south end of Padilla Bay (see enclosed map) and are an essential part of the sanctuary real property acquisition program.
>
> TNC purchased the real property for $79,960. According to the WDOE Appraisal, the real property has a fair market value (FMV) of $169,550. TNC will sell the 1,695.5 acres to WDOE at cost, resulting in a savings of $89,590 below the fair market value.

Letter from D. Rodney Mack, Assistant Director, Washington State Department of Ecology, to John Epting, Sanctuary Program Office, OCZM/NOAA (May 1, 1983). If governmental agencies could defeat the taking prohibition merely by working in consort with such nongovernmental buyers, the State would rarely, if ever, pay Just Compensation.

CONCLUSION

One year after Orion commenced this action, the State sought federal funds to acquire the tidelands that Orion's affiliate, The Padilla Bay Associates, holds under option. The National Oceanic and Atmospheric Administration ("NOAA") requested an "Attorney General opinion on the legal status of the option" before providing such funds. Letter from John Epting, Sanctuary Program Office, OCZM/NOAA, to Milt Martin, [Washington] Department of Ecology (May 6, 1983). NOAA required an Attorney General opinion because, as it informed the State, " . . . there is no way we would accept property having an option which may be exercised in a manner inconsistent with sanctuary purposes."

In response, the State informed NOAA that Assistant Attorney General Paddy Hickey O'Brien had reviewed the proposed acquisition and concluded:

> The National Oceanic, Atmospheric Administration (NOAA) Estuarine Sanctuary Guidelines, 15 CFR 921, also allow the acquisition of less than a fee simple interest, if sufficient permanence and control by the State can be assured. In this instance, permanence and control can be assured through planning and regulation under the Shoreline Management Act. Therefore, even if the option is exercised, permanent protection of the system would be assured.

Letter from D. Rodney Mack, Assistant Director, Washington Department of Ecology, to John Epting, Sanctuary Program Office, OCZM/NOAA (May 1, 1983) (forwarding Attorney General's opinion). Inexplicably, the State has forced Orion to spend, to date, six years establishing the taking that the State acknowledged years ago.

Now, in 1988, we repeat what the State Court wrote in *Orion I* in 1985:

> We are aware of the admonition contained in *King* v. *Seattle*, 84 Wn.2d 239, 252-53, 525 P.2d 228 [236] (1974), which is appropriately restated here.

> We are mindful, nonetheless, of the potential for abuse which legal process may serve in the hands of public officials, bankrolled with public funds, who seek to achieve by delay and the necessity for costly court suits or administrative hearings what they cannot achieve on the merits — the frustration of private citizens' legally protected activity.

App. B-44.

For all of the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

109 Wash. 2d 621, 747 P.2d 1062

[Nos. 52165-4, 52529-3.]
[En Banc. December 17, 1987.]

THE ORION CORPORATION, Respondent, v. THE STATE OF WASHINGTON, ET AL, Appellants, PADILLA BAY ASSOCIATES, Respondent.

Andersen, J., concurs in the result only; Dore, J., dissents in part by separate opinion; Dolliver, J., did not participate in the disposition of this case.

Nature of Action: A corporation owning tidelands within a designated estuarine sanctuary claimed under various theories that the State and a county had taken its property without compensation by regulating its use pursuant to the Shoreline Management Act. The Supreme Court previously held at 103 Wn.2d 441 that the action was not barred by the

plaintiff's failure to exhaust its administrative remedies.

Superior Court: The Superior Court for Skagit County, No. 82-2-00391-6, Walter J. Deierlein, Jr., J., on January 29, 1986, granted a summary judgment finding the State and the county liable for taking the plaintiff's property by excessive regulation.

Supreme Court: Holding that the county had acted only as the State's agent, that there were unresolved factual issues regarding the State's liability for a regulatory taking, and that the plaintiff was not entitled to recover on its other theories, the court reverses the judgment, grants judgment in favor of the county, and remands the case to decide specific issues of fact.

Kenneth O. Eikenberry, Attorney General, and Charles W. Lean, Assistant, for appellant State.

C. Thomas Moser, Prosecuting Attorney, and John R. Moffat, Chief Civil Deputy; Irene M. Hecht and William C. Smart (of Keller Rohrback), for appellant Skagit County.

Hillis, Clark, Martin & Peterson, P.S., by Mark S. Clark, James J. Ragen, Joseph B. Genster, and Richard R. Wilson, for respondents.

Norm Maleng, Prosecuting Attorney for King County, and Phyllis K. MacLeod, Deputy; Patrick D. Sutherland, Prosecuting Attorney for Thurston County, and Thomas R. Bjorgen, Deputy; Douglas N. Jewett, City Attorney for the City of Seattle, and Dennis J. McLerran, Assistant; J. Richard Aramburu on behalf of the Washington Environmental Council, amici curiae for appellants.

UTTER, J.--Orion Corporation (Orion) filed this action in 1982, in part alleging an inverse condemnation by excessive

regulation (regulatory taking). According to Orion, the Shoreline Management Act (SMA) and the Skagit County Shoreline Management Master Program (SCSMMP) had taken its Padilla Bay tideland property without just compensation. In a previous appeal, we held that Orion need not exhaust its administrative remedies because under the regulatory scheme, Orion could not obtain a permit to make any reasonably profitable use of its property. Orion Corp. v. State, 103 Wash.2d 441, 457-60, 693 P.2d 1369 (1985) (Orion I). On remand after Orion I, the trial court added Padilla Bay Associates (PBA) as coplaintiff, and all parties moved for summary judgment on a variety of issues.

In the instant appeal, the State of Washington (State) and Skagit County (County) challenge summary judgment granted Orion on remand. Orion and PBA also assign error to several trial court

rulings. The trial court rejected several procedural challenges and dismissed PBA's takings claim, along with all of Orion's claims except for the regulatory taking. We affirm each of these decisions. Concerning the regulatory takings claim, the trial court granted Orion summary judgment against both the State and the County, holding that the SMA and the SCSMMP had taken Orion's property without just compensation. In appealing the grant of summary judgment, the State and County raise three main issues: (1) what effect the public trust doctrine has on Orion's takings claim; (2) at what point, if ever, do land-use regulations become so excessive as to constitute a taking without just compensation; and (3) what remedy and measure of damages apply if such an unconstitutional taking occurs.

On the public trust issue, we affirm the trial court's conclusion that Orion

purchased its tidelands subject to the requirements of the public trust doctrine. We remand, however, for the trial court to determine what effect the trust has on Orion's takings claim. On the question of whether an unconstitutional taking has in fact occurred, we reverse, but reach different conclusions concerning each appellant. Because the County acted as the State's agent, it has no individual liability, and thus must be dismissed as a party. As to the State, we conclude that several genuine issues of material fact exist, making summary judgment improper. We therefore remand for resolution of the factual issues.

If upon remand the trial court determines that an unconstitutional taking has occurred, application of the regulatory regime to Orion's property is invalid. Because the taking is "temporary" and reversible, we hold that the State has

the option of curing the taking or maintaining the status quo by exercising eminent domain. Regardless of how the State exercises its legislative prerogative, while the regulation remains effective, the state and federal constitutions require the State to pay just compensation in the form of the leasehold value of the land.

FACTS

Padilla Bay, an area of approximately 11,000 acres, lies east of Anacortes, Washington. It is the most diverse, least disturbed, and most biologically productive of all major estuaries on Puget Sound. The Bay sustains a diverse and densely populated ecology, intensely important to a variety of life forms, including endangered species and a wide variety of commercially harvested species, such as juvenile salmon and Dungeness crab. Navigable at high tide, Padilla

could proceed with its development plans, this court held that "the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands." Wilbour v. Gallagher, 77 Wn.2d 306, 315-16, 462 P.2d 232, 40 A.L.R.3d 760 (1969), cert. denied, 400 U.S. 878, 27 L. Ed. 2d 115, 91 S. Ct. 119 (1970). As a result of Wilbour, Governor Evans placed all tideland fill projects under a moratorium, which lasted until 1971, when the SMA was enacted.

The SMA identified Padilla Bay as one of five "shorelines of statewide significance," and declared that state policy required preservation and protection of designated shorelines. See RCW 90.58. Like other local jurisdictions, the SMA required Skagit County to formulate a master program to implement state policy and regulate its particular shorelines. Until the County formulated its program

and received approval from the Department of Ecology (Ecology), regulations promulgated by Ecology governed the issuance of any shoreline development permits. Believing that the SMA precluded its project, Orion abandoned its Venetian-style development plan.

In 1973, the county assessor valued Orion's land at $45 per acre, basing the appraisal on the original tideland use--oyster production. Because the assessor failed to take the SMA into account, Orion appealed and succeeded in having the assessed value reduced to $12 per acre. Over the next year, Orion rejected two separate joint venture proposals in aquaculture[3] on its property, both of

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[3]The Skagit County Shoreline Management Master Program defines aquaculture as "the farming or culture of food fish, shell fish, or other aquatic plants and animals in fresh or salt water areas, and may require development such as fish hatcheries, rearing pens and structures, and shellfish rafts, as well as use of natural spawning and rearing

which would have been permissible under the SMA guidelines in force at the time.[4] In late 1974, Orion rejected the State Department of Game's offer to purchase the tideland holdings for $90 per acre, a fair market value determined by a commercial appraisal firm.

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areas." SCSMMP ch. 3.03(8).

[4]We acknowledge that Padilla Bay is an area containing unique or fragile resources, which the WAC regulations indicated "should be left undeveloped." Orion Corp. v. State, 103 Wn.2d 441, 446, 693 P.2d 1369 (1985) (citing WAC 173-16-040(5)). The regulations, however, identified aquaculture as "a preferred, water-dependent use", WAC 173-16-060(2)(a)(vi), deserving of protection from other activities, which when "[p]roperly managed . . . can result in long term over short term benefit" "of state-wide and national interest." (Italics ours.) WAC 173-16-060(2). Aquaculture met use preferences for statewide interest protection and long term benefit, both of which are listed as higher preferences than leaving fragile resources totally undeveloped. See WAC 173-16-040(5)(a)-(d). Therefore, there is every reason to believe that an aquaculture permit would have been issued to Orion when the WAC regulations controlled.

By 1976 further development took place in the state regulatory regime. First, Ecology adopted the Washington State Coastal Zone Management Program (WSCZMP), which designated Padilla Bay an area of particular concern. While the WSCZMP made the state eligible for federal grants, it did not impose any new land-use restrictions or regulations. Orion I, at 449. Second, Ecology approved and adopted the SCSMP as state regulation. WAC 173-19-010; WAC 173-19-370. The SCSMMP became the principal land use plan applicable to Orion's property. It designated Orion's property as "aquatic," a designation that foreclosed dredging and filling the tidelands, as Orion had intended. The only possible uses of any particular value were nonintensive recreation and aquaculture, the latter of

which required a conditional use permit. Orion I, at 458-60.[5]

Having concluded that aquaculture was not economically feasible, Orion explored the possibility of selling its land to the State. Nevertheless, Orion refused an offer of $110 per acre made by an environmental group, The Nature Conservancy. In 1977, Ecology attempted to interest the United States Fish and Wildlife Service (USFWS) in purchasing Padilla Bay, but USFWS had no interest

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[5]Even after formation and approval of the SCSMMP, Orion would probably have received an aquaculture use permit. See Orion I, at 457. We concluded in Orion I that "the State has made a conscious policy choice to preserve Padilla Bay in its natural state . . . [a] choice [that came] to fruition by the creation of the . . . Sanctuary." 103 Wn.2d at 457. While the State and County wanted to preserve Padilla Bay, the policy and regulations in effect prior to the Sanctuary reflect an intention only to foreclose Orion's plans to dredge, fill, and reclaim the tidelands, which would have destroyed their ecological and commercial value.

because existing state and federal regulations adequately protected the Bay's resources. Wilbur Hallauer, Ecology Director, suggested the State look for a way to compromise on the "takings" issue. Consequently, in 1978 Ecology initiated a serious effort to take advantage of a federal program under the Coastal Zone Management Act, which provided 50 percent of the funds necessary to fund establishment of estuarine sanctuaries.

Rather than pursuing formal condemnation proceedings, Ecology adopted a "willing seller" approach, under which tideland owners could either accept or reject the purchase offer without threat of a subsequent condemnation proceeding. A 1979 appraisal by a private firm concluded that the highest and best legal use of Orion's holdings was as marginal oyster land, and set an $80 per acre fair market value. Orion challenged the

appraisal and commissioned its own, which valued the tidelands at $1,200 per acre, based on the assumption that the State had taken Orion's legal right to fill in its tidelands and reclaim it as farmlands.

Although the parties again were stalemated, the Legislature took the necessary official steps and created the Padilla Bay Estuarine Sanctuary (the Sanctuary). Laws of 1980, ch. 180, § 1, p. 610. While the act did not designate any specific property constituting the Sanctuary, the EIS identified the proposed Sanctuary as including Orion's holdings. In August 1981, the State made its final offer of $100 per acre, which Orion rejected. Orion then instituted this suit.

Since that time the State has continued to purchase property for the Sanctuary. The underlying fee holders of acreage optioned by PBA sold their property to The Nature Conservancy for $45 per

acre. The State then accepted the Conservancy's offer to purchase the property at cost for the Sanctuary, recognizing that while it could include the property in the Sanctuary, PBA maintained the right to exercise its purchase option. The now existing Sanctuary does not include Orion's property, nor is acquisition of the property critical for the Sanctuary's viability. However, maps and other promotional materials displayed for the public in 1982, and still available today, include Orion's property holdings within the proposed Sanctuary.

PROCEDURAL HISTORY AND POSTURE

In filing this action, Orion alleged a taking of its tidelands by excessive regulation without just compensation, a taking by physical invasion, a taking by abusive precondemnation conduct, and violation of its federal civil rights under 42 U.S.C. § 1983. After remand in Orion I, the trial court added as coplaintiff Padilla Bay Associates, actual owner of the tideland options. All parties moved for summary judgment. The trial court dismissed Orion's § 1983 claim, the claims of a taking by physical invasion and by abusive precondemnation conduct, and PBA's claim, which had alleged a taking of its purchase options. Also denied were State and County summary judgment motions based on the ripeness doctrine, the statute of limitations, and on Orion's alleged failure to join an indispensable party.

In granting Orion's motion for summary judgment on the regulatory takings claim, the trial court held that the SMA and the SCSMMP prevented Orion from making any reasonably profitable use of its land. Thus, a taking by excessive regulation occurred, requiring just compensation damages. In addition, the trial court found that a common law public trust doctrine existed in Washington when Orion purchased its property. Rather than precluding a taking from occurring, the trial court held that the trust merely limited Orion's damages. To allow this court the opportunity to review all issues decided to this point, the trial court postponed a separate damage proceeding. Nevertheless, the trial court characterized the taking as permanent and set the measure of damages at the diminution of value caused by the Sanctuary's creation. We

granted review and approved the present alignment of the parties.

At the outset we note that all but one of the rulings challenged in this appeal came on summary judgment motions. Therefore, in reviewing the trial court's conclusions we must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party on each issue. Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982).

I

PROCEDURAL CHALLENGES

Before reaching the main substantive issues raised by this appeal, we must consider numerous procedural challenges.

A

RIPENESS OF ORION'S

REGULATORY TAKINGS CLAIM

Both the State and County moved for summary judgment, arguing that under recent United States Supreme Court

decisions, Orion's claim is not ripe until it actually submits a shoreline development permit application to the County. See MacDonald, Sommer & Frates v. Yolo Cy., ___ U.S. ___, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986); Williamson Cy. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). The ripeness requirement, however, is not a new development in regulatory takings jurisprudence. See, e.g., Agins v. Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). In any event, we find that our decision in Orion I does not conflict with the federal ripeness requirement.

Under most circumstances, the Supreme Court will not find a takings claim ripe until the initial government decision maker

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Under most circumstances, the Supreme Court will not find a takings claim ripe until the initial government decision maker

has arrived at a definite position, conclusively determining whether the property owner was denied "all reasonable beneficial use of its property . . ." Williamson Cy., 473 U.S. at 194. In Orion I, we held that after creation of the Sanctuary, Orion could not obtain a permit to make any reasonably profitable use of its property. 103 Wn.2d at 460. When a court concludes that a permit application for any use would be futile, the Supreme Court will find the regulatory takings claim ripe for review. Yolo Cy., 91 L. Ed. 2d at 296-7 n.8.

The State suggests we reconsider our Orion I conclusion in light of the more complete record developed upon remand. Pointing to new facts in the record, the State argues that Orion can obtain a development permit to conduct aquaculture on part of its tidelands. This new information includes: (1) a shoreline

conditional use permit has issued for operation of hydraulic clam harvesting in tidelands of nearby Skagit Bay; (2) a viable Sanctuary exists without including Orion's property; (3) the pulp mill discharge which prevented successful oystering no longer presents a problem; (4) in an affidavit, the director of Ecology's permit section concluded that aquaculture would be permitted in Padilla Bay; and (5) our decision, reached a few months after Orion I, approving a conditional use permit for a commercial dock located next to a wildlife refuge. Nisqually Delta Ass'n v. DuPont, 103 Wn.2d 720, 696 P.2d 1222 (1985).

While the State's new information may make it more likely that an aquaculture conditional use permit would have issued prior to the Sanctuary's creation, these facts have no bearing on our Orion I conclusion. There, we held that the

existence of the Sanctuary would require denial of an aquaculture conditional use permit. Orion I, at 459. Under the SCSMMP, "only two uses are potentially conceivable on Orion's property, aquaculture and recreational use." Orion I, at 458. Recreational uses, however, "would provide Orion no economic return." Orion I, at 458. Aquaculture required a conditional use permit, which could not issue if the proposed use was incompatible with permitted activities in the area and would cause adverse effects to adjacent properties. Orion I, at 459. Because the adjacent property was the Sanctuary and Sanctuary activities included only research and recreation, we concluded that aquaculture would be incompatible, making issuance of a conditional use permit impossible. Orion I, at 459. Our subsequent decision in Nisqually Delta has no application here. There, we held

that a commercial dock could be built next to a wildlife refuge in a shoreline of statewide significance, because issuance of the conditional use permit would not result in "unreasonable" adverse effects. Nisqually Delta, at 732-33. However, the commercial dock was to be built on land classified as urban, while Orion's land, classified as aquatic, is part of the same ecological unit as the Sanctuary.

We therefore continue to adhere to our Orion I conclusion, and hold that an application for a shoreline development permit remains futile, making Orion's takings claim ripe for review.

B

STATUTE OF LIMITATIONS

The County appeals the trial court's denial of its motion to dismiss on the basis of the statute of limitations. According to the County, Orion's action was untimely because a 3-year statute of

limitations should apply to Orion's claim of inverse condemnation by excessive regulation. We affirm the trial court's decision, noting that regardless of which time period applies, Orion's claim was not time barred.

Recently we recognized that "[i]t is well settled in Washington that where a taking occurs by eminent domain or by inverse condemnation, a landowner's right to seek just compensation may not be barred merely by the passage of time." Valley View Indus. Park v. Redmond, 107 Wn.2d 621, 631, 733 P.2d 182 (1987). To extinguish these types of claims, the government must gain title to the interest in question by way of adverse possession. Valley View, at 631; Petersen v. Port of Seattle, 94 Wn.2d 479, 483, 618 P.2d 67 (1980); Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). However, "unlike eminent domain

and inverse condemnation, regulatory takings . . . could never meet the elements of adverse possession." Valley View, at 631. Unless some statute of limitations applies, the State could never extinguish a regulatory takings claim. Under federal law, whenever land use regulations amount to a taking, the just compensation clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, requires the government to pay the landowner the leasehold value for the use of the land. See First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 96 L. Ed. 2d 250, 107 S. Ct. 2378, 2388 (1987). Consequently, in the absence of statutory limits, damages would continue to mount until the property owner chose to bring an action.

In support of a 3-year time limit, the County points to the general limit for property damage cases, RCW 4.16.080,

and the United States Supreme Court's recent adoption of a 3-year limit for all § 1983 actions, regardless of their underlying characterization. Wilson v. Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). The Oregon Supreme Court adopted a 6-year limit for regulatory inverse condemnation actions. Suess Builders Co. v. Beaverton, 294 Or. 254, 656 P.2d 306 (1982). Although the Oregon court relied on statutes that have no counterpart in Washington, our Legislature has adopted a 6-year limit on actions for the "use . . . of real estate." RCW 4.16.040. Another possibility would be to use the 10-year prescriptive period from the adverse possession statute without requiring the other adverse possession elements. See RCW 4.16.020.

As explained in our discussion of Orion's regulatory takings claim (see section III(D)), the Sanctuary's creation

in August of 1980 was the operative date for a takings analysis. Orion's action, filed in 1982, comes within the federal 3-year limitation, as well as the 6-year and 10-year alternatives. Consequently, regardless of which time period we ultimately apply, Orion's action was timely.

C

FAILURE TO JOIN INDISPENSABLE PARTY

After remand, the trial court denied the County's motion to dismiss for failure to join an indispensable party. CR 19. The County appeals, and argues that federal regulations in place after 1968 controlled Orion's ability to develop its tidelands, making the federal government an indispensable party to this action. Even assuming the validity of the County's argument, where a party cannot be joined, we must determine whether, in "equity and

good conscience", the action should proceed. CR 19(b).

Orion could not join the federal government in state court. To bring a claim in excess of $10,000 for inverse condemnation under the Fifth Amendment, the claimant must file in the United States Court of Claims. 28 U.S.C. §§ 1346, 1491; Reid v. United States, 715 F.2d 1148, 1153 (7th Cir. 1983). If Orion filed its claim in the Court of Claims, it could not join the State and County. See Boyd v. United States, 207 Ct. Cl. 1, 4 n.1 (1975) (Court of Claims may only enter judgments against the United States), cert. denied, 424 U.S. 911, 47 L. Ed. 2d 314, 96 S. Ct. 1106 (1976). To avoid depriving Orion of any forum for its action, equity and good conscience require us to allow Orion's action to continue without federal participation. CR 19(b).

D

STANDING OF PADILLA BAY ASSOCIATES

PBA claims that as an owner of unexercised options to purchase Padilla Bay tideland property, it has standing to bring an action for inverse condemnation by excessive land-use regulations. In dismissing PBA's claim, the trial court concluded that unexercised options to purchase tidelands "are not a sufficient property interest to support an award of damages for an unconstitutional taking." Clerk's Papers, at 2050. This conclusion conforms with the general rule, which views unexercised options as an insufficient interest to allege a taking regardless of the circumstances. See Annot., 17 A.L.R.4th 337, 463 (1982). We have rejected the general rule, choosing instead to resolve such claims by examining the circumstances and relation of the parties. Spokane Sch. Dist. 81 v.

Parzybok, 96 Wn.2d 95, 633 P.2d 1324 (1981). PBA argues that it has standing to bring this action because the questions of equity and fairness that motivated our decision in Parzybok are present here. We disagree.

The circumstances surrounding the Parzybok option differ both conceptually and factually from the case at hand. Parzybok concerned a traditional condemnation proceeding where the condemnation award exceeded the purchase price indicated in the option. Contained in a lease covenant, the option was not exercisable until 7 years after the lease began. Condemnation took place, however, in year 6, thereby denying the optionee the opportunity to exercise the option. We held that the Parzybok optionee could participate in the condemnation award due to the loss of "a contract right, in a definitely measurable amount." Parzybok,

at 104. Two key facts led to our holding: we believed that, given the opportunity, the optionee would have exercised the option; and the property's fair market value had in fact increased above the option price.

By contrast, PBA does not seek a share of a traditional condemnation award. Rather, it claims standing to bring an inverse condemnation suit to challenge land-use regulations, allegedly so onerous that they deprive the property owner of any reasonably profitable use. Yet under the option terms, PBA has no right to make any use of the subject property until it purchases the property. In Parzybok, the condemnation proceeding extinguished the optionee's contract right. A failure to allocate the excess value to the optionee would have worked a permanent harm. Thus far, PBA has lost no contract right; the options remain

exercisable.[6] Even if a complete taking has occurred, PBA has the ability to exercise its options, purchase the property, and sell it to the State for just compensation.[7]

In Parzybok, we recognized that not every option to purchase was necessarily sufficient to participate in a condemnation award. Parzybok, at 104. Under the facts of this case, we agree with the

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[6]Although PBA has paid the $6,000 a year option price since 1971, it has done so in order to maintain its rights to purchase the property. PBA specifically recognizes that its options remain exclusive, assignable and enforceable against the optionor's successors.

[7]We doubt whether PBA would have to go to such lengths. While the State has acquired the underlying fee and included the property in the Sanctuary, the State explicitly recognizes that it holds the property subject to PBA's option to purchase. Thus, if a taking has occurred and the State chooses to purchase Orion's property for the Sanctuary, it would undoubtedly decide to save time and money by simply paying PBA the amount by which the condemnation award exceeded the option's $100 per acre purchase price.

trial court. PBA's purchase options are not a sufficiently strong property interest to support its regulatory takings claim.

E

MOTION TO STRIKE

One final procedural matter remains. After remand in Orion I, the County filed the affidavit of Richard L. Settle, a professor of law at the University of Puget Sound, who testified as an expert witness on land use. Clerk's Papers, at 1568. Orion moved to strike the Settle affidavit, arguing that it "did not set forth the facts admissible in evidence, but rather consists of legal conclusions, legal argument, and speculation." Clerk's Papers, at 1599. After reviewing the affidavit, the trial court exercised its discretion, admitted the affidavit for a limited purpose, and denied the motion to strike. We affirm.

Essentially, this issue rehashes a similar dispute resolved in Orion I. There, the State and County objected to an expert opinion affidavit by Peter C. Buck on the same grounds relied on here by Orion. Orion I, at 461. We characterized the issue as a close question, gave deference to the trial court's decision to admit, but required the court to consider only factual information and to disregard any legal conclusions in the affidavit. Orion I, at 461-62. Here, in admitting the affidavit, the trial court disregarded the legal conclusions and looked merely to the historical perspective the affidavit provided on the regulatory scheme and on prior development of the tidelands. Given our decision in Orion I on the Buck affidavit, and the factual nature of the information the judge obtained from the affidavit, we hold that the trial court

properly exercised its discretion in admitting the affidavit for a limited purpose.

II

PUBLIC TRUST DOCTRINE

In denying State and County motions to dismiss, the trial court held that prior to the SMA's enactment in 1971, a public trust doctrine existed in Washington. Because not all uses of Padilla Bay tidelands would impair the trust, the trial court held further that the public trust doctrine reduced Orion's alleged damages, but did not entirely preclude the takings claim. Clerk's Papers, at 2038. On appeal, the State and County challenge the trial court's conclusion on the scope of the doctrine's operation. Orion argues that no public trust exists in Washington, but if such a trust exists, it does not apply to second class tidelands.

Given our recent decision in Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989 (1987), Orion's argument is no longer tenable. In Caminiti, we held that a public trust doctrine has always existed in Washington. Caminiti, at 669-70. We recognized that state ownership of property has two aspects, the private property interest, which reflects the State's title to the property, and the public authority interest, which reflects the State's sovereignty and dominion. Caminiti, at 666-67. The public trust doctrine emanates from this public authority interest, which requires the state to maintain its dominion in trust for the people. Caminiti, at 667. Because title in and sovereignty over Washington's tidelands and shorelands vested in the state upon admission into the Union, the public trust doctrine applies to Orion's

Padilla Bay tidelands. See Caminiti, at 666.

In arguing that no public trust has ever applied to second class tidelands, Orion points to the Legislature's decision to convey large tracts of second class tidelands to private parties. According to Orion, this court expressly approved the diking and filling of 10,000 acres of Padilla Bay tidelands. See Jones v. Hammer, 143 Wash. 525, 255 P. 955 (1927). In Jones, however, the parties did not raise a public trust challenge to diking and filling. Rather, the action merely required this court to rule whether the general diking statute included second class tidelands. Jones, at 530. We acknowledge that during the early part of the 20th century, state policy included the widespread sale of tideland property and the encouragement of diking and

filling.[8] Nevertheless, while the State has authority to convey title to these properties, "[t]he Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands." Caminiti, at 666; see also Long Sault Dev. Co. v. Call, 242 U.S. 272, 279, 61 L. Ed. 294, 37 S. Ct. 79 (1916) (the public trust devolved to the states upon gaining statehood and is a trust that the state legislature "[cannot] relinquish by a transfer of the property"). The public trust in tidelands and shorelands developed out of the public's need for access to navigable waters. We have repeatedly stated that the sale of second class tidelands, like other trust property, is subject to the

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[8]In Caminiti, we recognized that prior to 1971 the State had sold 60 percent of its tidelands and 30 percent of its shorelands. Caminiti, at 666.

paramount public right of navigation and fishery. Caminiti, at 667.

Thus, the trial court correctly concluded that prior to the adoption of the SMA, Orion's property was burdened by the public trust doctrine. At issue in Caminiti, however, was whether the state violated its public trust duties by granting a revocable license to build recreational docks in state owned tidelands and shorelands. RCW 79.90.105; Caminiti, at 666. Here, the facts raise the question of what restrictions the public trust places on Orion, a private party that

purchased property subject to the terms of the trust.[9]

The public trust doctrine resembles "a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife." Reed, The Public Trust Doctrine: Is it Amphibious?, 1 J. Envtl.

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[9]We do not mean to suggest that once the state conveys to a private party property subject to the trust the property will always be burdened by the trust requirements. For example, the California Supreme Court has held that although the trust originally applied to all tidelands in the San Francisco Bay, properties already dredged and filled under earlier grants were no longer subject to the trust. Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, Santa Fe Land Imp. Co. v. Berkeley, 449 U.S. 840, 66 L. Ed. 2d 48, 101 S. Ct. 119 (1980). In reaching its decision, the California court stated that "the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes." Berkeley, 26 Cal. 3d at 534.

L. & Litigation 107, 118 (1986). As a result, at the time it purchased its tidelands, Orion could make no use of the tidelands which would substantially impair the trust. Historically, the trust developed out of the public's need for access to navigable waters and shorelands, and thus the trust encompassed the right of navigation and fishery. Caminiti, at 669. The trust's relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay. Reed, 1 J. Envtl. L. & Litigation, at 111. Recognizing modern science's ability to identify the public need, state courts

have extended the doctrine beyond its navigational aspects.[10] We have had occasion to extend the doctrine beyond navigational and commercial fishing rights to include "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes . . ." Wilbour v. Gallagher, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), cert. denied, 400 U.S. 878, 27 L. Ed. 2d

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[10] See, e.g., In re Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980) (under trust doctrine state can claim damages for killing of waterfowl by oil spill); Just v. Marinette Cy., 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (doctrine applies to shorelands totally above water); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (public trust protects ecological values and right to preserve tidelands in natural state). See generally Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C.D. L. Rev. 269 (1980) (the doctrine has gone beyond its original water based scope and now applies to public lands that have special importance for health, welfare, and safety of the public).

115, 91 S. Ct. 119 (1970).[11] Resolution of this case does not require us to decide the total scope of the doctrine.

In an unchallenged finding, the trial court held that for the purposes of public recreational navigation, Padilla Bay is navigable. Clerk's Papers, at 2038. Therefore, Orion had no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as incidental rights and purposes recognized previously by this court. See Portage Bay-Roanoke Park Comm'ty Coun. v.

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[11]We have also observed that trust principles are reflected in the SMA's underlying policy, which contemplates "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd., 92 Wn.2d 1, 4, 593 P.2d 151 (1979) (quoting RCW 90.58.020).

Shorelines Hearings Bd., 92 Wn.2d 1, 4, 593 P.2d 151 (1979); Wilbour, at 316. Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands. Since a "property right must exist before it can be taken," Crooks, The Washington Shoreline Management Act of 1971, 49 Wash. L. Rev. 423, 456 (1974), neither the SMA nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill project.

The State argues further that the public trust doctrine precludes Orion's takings claim in its entirety. The validity of the State's argument depends upon whether Orion's property, burdened by the trust, is functionally and economically adaptable to some present, possible, and reasonably profitable use. Carlson v. Bellevue, 73 Wn.2d 41, 50-51, 435 P.2d 957 (1968). Although the trial

court concluded that not all uses of Orion's tidelands would substantially impair public trust rights, it did not identify any specific uses. As we explain later in this opinion, based on the record below, we cannot determine whether Orion's property is adaptable to any use that does not impair the trust. As a result we have remanded for a further factual determination.

III

REGULATORY TAKINGS

Claims of inverse condemnation by excessive regulation have generated controversy around the country.[12] In the

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[12] See, e.g., Franck & Pribyl, Recent Developments in Condemnation Law, 18 Urb. Law. 877 (1986); Sallet, Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues, 18 Urb. Law. 635 (1986); Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 Calif. L. Rev. 561 (1984); Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 J. Urb. & Contemp. L. 3 (1983); Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583

instant case, amici curiae briefs have been filed on behalf of a variety of associations and governmental entities.[13] The State, County, and the amici contend that resolution of the instant dispute could have a devastating impact on legislative attempts to address Washington's most difficult and environmentally sensitive land-use problems. Nevertheless, we must also keep in mind the need to protect property owners' constitutional rights to due process and to just compensation whenever their property is "taken" for public use. Moreover, subsequent to briefing and oral argument, the Supreme Court issued three

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(1981).

[13]The following submitted amici curiae briefs: the City of Seattle and the Association of Washington Cities, the Washington Environmental Council, the Washington State Association of Counties and the Washington Association of Prosecuting Attorneys, and King County.

decisions addressing various aspects of the regulatory takings controversy. Nollan v. California Coastal Comm'n, ___ U.S. ___, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, ___ U.S. ___, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987).

A

Several threshold questions must be resolved before we address the specific regulatory takings issues raised in this appeal. Because Orion alleged a taking by both the State and the County, we must first determine which government bears responsibility for the alleged taking. The trial court denied the County's motion to dismiss it as a party and the County challenges that decision. It argues that no action on its part proximately caused

the alleged taking. We agree that the trial court erred in denying the County's motion to dismiss; the State must take full responsibility if a taking has in fact occurred.

In developing the SCSMMP, the County acted under the direction and control of the State. State regulations required the County to give preferences to certain uses. WAC 173-16-040(5). As to estuaries, the regulations suggested that such lands should be left in their natural state. WAC 173-16-050(5). No one has alleged that SCSMMP requirements for issuing a conditional use permit differed in any substantial way from the WAC guidelines. Moreover, the SCSMMP became effective only when adopted or approved by the State Department of Ecology. RCW 90.58.090. Upon adoption, the SCSMMP became state regulation. Harvey v. Board of Cy. Comm'rs, 90 Wn.2d 473, 584 P.2d

391 (1978); Friends & Land Owners Opposing Dev. v. Department of Ecology, 38 Wn. App. 84, 684 P.2d 765 (1984). Because the County acted at the instance of and, in some material degree, under the direction and control of the State, an agency relationship developed between the parties. See Hewson Constr., Inc. v. Reintree Corp., 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). As the principal of an agent acting within its authority, the State must take full responsibility if a taking occurred. See, e.g., Tyler v. Grange Ins. Ass'n, 3 Wn. App. 167, 473 P.2d 193 (1970). Consequently, we reverse the trial court and dismiss the County from this action.

The State contends, however, that the Department of Ecology is insulated from Orion's inverse condemnation claim because Ecology does not have the power of eminent domain under the SMA. RCW

90.58.240(1); see Crooks, The Washington Shoreline Management Act of 1971, 49 Wash. L. Rev. 423, 457 (1974). The State bases its no-power-to-condemn argument on our definition of inverse condemnation as "'an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power.'" Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 8 n.1, 548 P.2d 1085 (1976). Because Ecology has no power of eminent domain, the State argues that Highline precludes Orion's action.

We find the State's argument unpersuasive and without merit. Rather, we follow the well reasoned approach employed by the Eleventh Circuit to reject a similar contention. "As long as the state acts through one of its arms in such a way as to deprive an individual of

his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power." Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043-44 (11th Cir. 1982).

B

The State contends that the trial court erred in concluding that application of the regulatory regime to Orion's property resulted in a taking violative of both the United States Constitution and the Washington Declaration of Rights. Landowners have a right, under article 1, section 16 of the Washington Constitution,[14] as well under the fifth and fourteenth amendments to the United

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[14]In its relevant part, Const. art. 1, § 16 provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made . . ."

States Constitution,[15] to challenge the constitutionality of land use regulations in an inverse condemnation action. First English Evangelical Lutheran Church, 107 S. Ct. at 2382-83; Buttnick v. Seattle, 105 Wn.2d 857, 719 P.2d 93 (1986). Police power actions limiting the use of private property can constitute a de facto exercise of eminent domain requiring just compensation. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, supra; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14, 67 L. Ed. 322, 43 S. Ct. 158 (1922); Buttnick v. Seattle, supra; Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 732, 565 P.2d 1162 (1977). Yet, articulating

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[15]The fifth amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation", and was first applied to the states in Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

a doctrinally consistent, definitive test has proved an elusive goal, sometimes characterized as "the 'lawyer's equivalent of the physicist's hunt for the quark.'" See, e.g., Williamson Cy. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 n.17, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

The inability to develop a definitive police power "takings" doctrine has been linked to two doctrinal inconsistencies. First, commentators point to unresolved tensions between divergent lines of authority. See, e.g., Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 J. Urb. & Contemp. L. 3, 20 (1983); Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583, 586-87 (1981). On the one hand, federal and state case law hold an exercise of the police power protective of the public health, safety, or welfare

cannot be a taking requiring compensation. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, supra; Miller v. Schoene, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928); Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1897); Cougar Business Owners Ass'n v. State, 97 Wn.2d 466, 647 P.2d 481 (1982), cert. denied, 459 U.S. 971 (1983); Markham Advertising Co. v. State, 73 Wn.2d 405, 427, 439 P.2d 248 (1968), appeal dismissed, 393 U.S. 316, 21 L. Ed. 2d 512, 89 S. Ct. 553 (1969).[16] On the other hand,

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[16]For example, in Mugler, the Supreme Court held that no taking occurred when Kansas prohibited the manufacture and sale of intoxicating liquor, thereby destroying most of the value of a brewery built when it was legal to do so. Mugler v. Kansas, 123 U.S. 623, 657, 31 L. Ed. 205, 8 S. Ct. 273 (1897). In Cougar Business Owners Ass'n, we rejected a takings challenge to an emergency regulation intended to protect the public. We held that inclusion of the town of Cougar in a restricted zone created around Mt. St. Helens constituted a valid exercise of the State's police power, despite the temporary, near total economic deprivation suffered. Cougar Business Owners Ass'n

regulatory takings jurisprudence holds that even a valid exercise of the police power limiting the use of private property can go "too far" and be a "taking". See, e.g., Hamilton Bank, at 185; Pennsylvania Coal, 260 U.S. at 413-14; Granat v. Keasler, 99 Wn.2d 564, 569-70, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983); Maple Leaf Investors, at 731.

In addition to the conflicting authority, commentators have also pointed out that the regulatory takings doctrine and the long-standing substantive due process test seem analytically identical. See, e.g., Stoebuck, 25 J. Urb. & Contemp. L. at 20; Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis,

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v. State, 97 Wn.2d 466, 476-79, 647 P.2d 481 (1982), cert. denied, 459 U.S. 971 (1983).

57 Wash. L. Rev. 715, 729 (1982). Under the classic, 3-pronged, substantive due process test of reasonableness, a police power action must be reasonably necessary to serve a legitimate state interest. Goldblatt v. Hempstead, 369 U.S. 590, 594-95, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); Lawton v. Steele, 152 U.S. 133, 137, 38 L. Ed. 385, 14 S. Ct. 499 (1894); West Main Assocs. v. Bellevue, 106 Wn.2d 47, 52, 720 P.2d 782 (1986); Cougar Business Owners Ass'n v. State, supra at 476. A regulatory taking also hinges on whether the challenged regulation is "reasonably necessary to the effectuation of a substantial public purpose", Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 127, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) or "'does not substantially advance legitimate state interests . . .'", Keystone Coal Ass'n, 94 L. Ed. 2d at 488 (quoting Agins v. Tiburon, 447 U.S. 255,

260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980)).[17] Likewise, little difference seems to exist between the substantive due process requirement that police power actions not be overly oppressive on an individual property owner, Goldblatt, 369

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[17]Our case law has never referred to the nexus between the public purpose and the regulation as determinative of a regulatory taking. In its most recent decision, the Supreme Court maintains that its "verbal formulations in the takings field have generally been quite different" from the standards applied to due process claims. Nollan v. California Coastal Comm'n, ___ U.S. ___, 97 L. Ed. 2d 677, 107 S. Ct. 3141, 3147 n.3 (1987). While the Court admits that its decision in Goldblatt v. Hempstead, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962) does assume that the inquiries are the same, it characterizes that assumption as inconsistent with the later case requirement "that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . ." Nollan, 107 S. Ct. at 3141 n.3. Justice Brennan's analysis of the phraseology used, however, indicates that the slight difference between "substantially advance" and "reasonably necessary" "cannot, however, obscure the fact that the inquiry in each case is the same." Nollan, 107 S. Ct. at 3151 n.1 (Brennan, J., dissenting).

U.S. at 594-95; West Main Assocs., 106 Wn.2d at 52, and hinging a taking on whether a regulation has gone "too far", causing the property owner to suffer an economic deprivation significant enough to outweigh the public interest. Keystone Coal Ass'n, 94 L. Ed. 2d at 493; Granat, at 569-70; Maple Leaf Investors, at 734.

Our own case law provides an excellent example of the doctrinal blurring that has occurred between due process and regulatory takings. In some cases we test the validity of land use regulations using the 3-pronged, substantive due process test, see, e.g., West Main Assocs. v. Bellevue, 106 Wn.2d 47, 52, 720 P.2d 782 (1986); Cougar Business Owners Ass'n, at 476. If the same party alleges a regulatory taking, we follow the Supreme Court, and purport to ignore substantive due process, applying instead the regulatory takings analysis derived from

Pennsylvania Coal. See, e.g., Department of Natural Resources v. Thurston Cy., 92 Wn.2d 656, 601 P.2d 494 (1979), cert. denied, 499 U.S. 830 (1980); Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977). Nevertheless, our regulatory takings doctrine and the 3-pronged substantive due process test seem almost analytically identical--resolution under either approach depends upon the regulation's reasonableness. Compare West Main Assocs. and Norco Constr., Inc. v. King Cy., 97 Wn.2d 680, 685, 649 P.2d 103 (1982), with Buttnick v. Seattle, 105 Wn.2d 857, 862, 719 P.2d 93 (1986), Granat v. Keasler, supra at 569-70 and Kennedy v. Seattle, 94 Wn.2d 376, 386, 617 P.2d 713 (1980). See also Granat, at 571-72 (Utter, J., concurring). In fact, in the past 20 years we have found a taking only on two occasions, and in each we implicitly

employed a substantive due process analysis and remedy. See Granat v. Keasler, supra; Kennedy v. Seattle, supra.[18]

The fact that both the substantive due process test and the regulatory takings doctrine conceptually apply to the problem of excessive regulation should not be surprising. Basically, the primary problem caused by an excessive police power regulation is that it requires the landowner to shoulder an economic burden,

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[18] In Kennedy, for example, we characterized our approach as a takings analysis, but invalidated a Seattle houseboat moorage ordinance as unreasonable. 94 Wn.2d at 386. Three years later, in Granat, we used a due process reasonableness test to find another section of the Seattle houseboat-moorage ordinance unreasonable because the landlord wanted to use the moorage for his houseboat, but the ordinance prevented him from evicting his tenant. Because we found the ordinance unreasonable, it constituted a taking. But the remedy included restitution of the property and statutory costs, not just compensation damages. 99 Wn.2d at 569-70.

which in justice and fairness the public should rightfully bear. Kaiser Aetna v. United States, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). We can protect landowners from the unfair burden by invoking either the constitutional guarantee that property will not be deprived without due process of law, U.S. Const. amends. 5, 14; Const. art. 1, § 3, or the constitutional requirement of just compensation whenever the state exercises its power of eminent domain to take private property for public use. U.S. Const. amend. 5; Const. art. 1, § 16. The crucial difference lies in the remedy to be applied: invalidation or the payment of just compensation.

This is, of course, not an insignificant difference. Once we characterize an excessive regulation as a taking, the mandate of article 1, section 16 requires just compensation.

Likewise, the Fifth and Fourteenth Amendments require payment for the time that the public had use of the land while the regulation remained effective. First English Evangelical Lutheran Church, 107 S. Ct. at 2388. Thus, choosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. If all excessive regulations require just compensation, rather than invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems. See, Sallet, Regulatory "Takings" and Just

Compensation: The Supreme Court's Search for a Solution Continues, 18 Urb. Law. 635, 649-50 (1986).

Strict liability would not result for all excessive regulations, however, under the approach developed in our own regulatory takings jurisprudence. Our case law has successfully harmonized the Pennsylvania Coal "too far" balancing approach with Mugler's insulation of police power actions from characterization as a taking. The first step in our regulatory takings analysis requires assessment of the economic deprivation suffered by the landowner, as part of a case-by-case balancing of the public interest served by the regulation against the private landowners' interests in not being burdened by restrictions on the use of their property. Granat v. Keasler, 99 Wn.2d 564, 569, 663 P.2d 830 (1983); Department of Natural Resources v. Thurston

Cy., 92 Wn.2d 656, 669, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980); Maple Leaf Investors, at 731. Assessment of the economic impact of the regulation reflects the Pennsylvania Coal "too far" test.

A significant enough economic impact has never, in and of itself, been sufficient to establish a regulatory taking under Washington law. Occurrence of a compensable taking has always depended upon the purpose and actual effect of the government's interference with the use of the property. See, e.g., Granat, at 569; Department of Natural Resources v. Thurston Cy., supra at 669; Maple Leaf Investors, at 733-34. We have long recognized a conceptual difference between a "taking" by eminent domain, which takes property for public use, and the exercise of the police power, which limits the landowner's use to "conserve the safety, morals,

health and general welfare of the public." Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 732, 565 P.2d 1162 (1977) (quoting Conger v. Pierce Cy., 116 Wash. 27, 35-36, 198 P. 377, 18 A.L.R. 393 (1921)).[19] In so doing, we have reflected the position adopted by the Supreme Court in Mugler, where the Court stated that a prohibition on injurious uses must be tested not under principles governing eminent domain, but rather under the due process guarantee. Mugler, 123 U.S. at 668-69; see also Stoebuck, 25 J. Urb. & Contemp. L. at 12 (characterizing Mugler as announcing that

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[19] Several state courts have distinguished police power actions having a valid purpose and effect from actions that effect a de facto eminent domain taking. See, e.g., Carter v. South Carolina Coastal Coun., 314 S.E.2d 327 (S.C. 1984); Wyoming Borough v. Wyco Realty Co., 64 Pa. Commw. 459, 440 A.2d 696 (1982); Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), cert. denied sub nom., Taylor v. Graham, 454 U.S. 1083 (1981).

"the police power's being one thing and the eminent domain power's being another, no exercise of police power is an eminent domain 'taking"). Thus, in Maple Leaf Investors, as well as subsequent cases, we held that the challenged regulation could not effect an eminent domain taking, unless the nature of the encumbrance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land. See, e.g., Department of Natural Resources v. Thurston Cy., 92 Wn.2d 656, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980); Rains v. Department of Fisheries, 89 Wn.2d 740, 575 P.2d 1057 (1978); Maple Leaf Investors, at 733-34.

By harmonizing Pennsylvania Coal and Mugler, our case law implicitly recognized a dividing line between land-use regulations that deprive property rights without due process and land-use

regulations that go one step further to effect a compensable taking. The extent of the economic deprivation served as no more than a metaphor for determining the regulation's validity under substantive due process, that is, whether the regulation is unreasonably oppressive on an individual property owner. See Fred F. French Investing Co. v. New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (concluding that the Pennsylvania Coal "too far" test was merely a "metaphor" for a due process violation). If the landowner has suffered a significant enough economic deprivation, the land-use regulation would be overly oppressive, and thus an invalid exercise of the police power. Just compensation would be required only if during the time the regulation remained in effect, it went beyond seeking to safeguard the public from harm to

accomplish a de facto exercise of the eminent domain power.

By clearly delineating when an excessive regulation violates substantive due process, as opposed to accomplishing a de facto eminent domain taking, we can best protect the property owner from shouldering the cost of a burden the public should bear, without unnecessarily creating the specter of unanticipated financial damages for all excessive regulations. Thus, our approach enables us to meet our most important consideration of reconciling "property rights and social needs." See Department of Ecology v. Pacesetter Constr. Co., 89 Wn.2d 203, 210, 571 P.2d 196 (1977).[20]

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[20] In Pacesetter Constr., we rejected a challenge to the balancing approach based on the distinction between the police power and the eminent domain power. See Department of Ecology v. Pacesetter Constr. Co., 89 Wn.2d 203, 210, 571 P.2d 196 (1977). There, the challenger argued that an exercise of the police power could never trigger the just compensation

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It is well recognized, however, that the federal constitution sets a minimum floor of protection below which state law may not go. See, e.g., Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). We have often had occasion to determine whether our state constitution provides broader civil liberty protection than the minimum requirements set by the federal constitution. See, e.g., State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986); State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984). If our state constitution provides the protection sought, a federal

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requirement. We concluded, however, that a mere verbal distinction did not reconcile property rights and social needs. Pacesetter Constr., at 210. By recognizing the distinction between a police power limitation, the validity of which continues to depend on the balancing test, and a de facto eminent domain taking, we can better reconcile those competing interests.

question under the Fourteenth Amendment's due process clause does not arise. State v. Coe, 101 Wn.2d 364, 374, 679 P.2d 353 (1984); accord, Massachusetts v. Upton, 466 U.S. 727, 730-31, 80 L. Ed. 2d 721, 104 S. Ct. 2085 (1984) (per curiam) (Stevens, J., concurring); Linde, E Pluribus--Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 178 (1984). Due to recent events, however, we must ensure that our state approach conforms with the minimum due process floor set by the fifth amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. See First English Evangelical Lutheran Church v. County of Los Angeles, ___ 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) (invalidating as violative of the Fifth and Fourteenth Amendments the California rule limiting the remedy for a regulatory taking to invalidation).

In its recent trio of takings decisions, the Supreme Court attempted to settle various aspects of the controversy surrounding the federal regulatory takings doctrine. See Nollan v. California Coastal Comm'n, ___ U.S. ___, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, ___ U.S. ____, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). Despite these attempts, the definitive answers, so necessary for state courts to make reasoned determinations concerning minimal federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a 3-month separation,

recent cases do not cite each other.[21] As Justice Stevens observed, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [federal regulatory] takings jurisprudence." Nollan, 107 S. Ct. at 3163 (Stevens, J., dissenting).

At minimum, we can conclude that the federal regulatory takings doctrine precludes us from expressly hinging occurrence of a taking on whether the invalidated regulation actually provided the public with some use of the land. Federal takings jurisprudence seems founded

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[21]For example, in March 1987, the majority opinion in Keystone Coal Ass'n, written by Justice Stevens, went to great length to explain the federal takings doctrine's various elements. Keystone Coal Ass'n, 94 L. Ed. 2d at 485-99. Yet in June, the majority opinions in First English Evangelical Lutheran Church and Nollan, written respectively by Chief Justice Rehnquist and Justice Scalia, both of whom dissented in Keystone Coal Ass'n, never acknowledged the existence of the Keystone decision.

on the concept that a denial of all use resulting in a significant enough economic deprivation in and of itself amounts to a compensable taking. First English Evangelical Lutheran Church, 107 S. Ct. at 2386-88. For the purposes of whether a compensable taking has occurred, the Supreme Court does not explicitly recognize a distinction between a police power deprivation of all use, invalid as a substantive due process violation, and a regulation that actually takes property for public use, which would require compensation. In addition, the Court in Nollan rejected the contention that the standards for a takings challenge and a due process challenge are identical. Nollan, 107 S. Ct. at 3147 n.3.

These differences, however, seem more linguistic than substantive.[22]

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[22]For example, the result reached in Nollan would have been the same under the 2-step due process/eminent domain

Similar to our state analysis, federal law affords some special protection to regulations of the type at issue in Mugler--police power actions seeking to safeguard public health and safety. See Keystone Coal Ass'n, 94 L. Ed. 2d at 489-92. As we read the Keystone Coal Ass'n opinion, exercises of the police power cannot be characterized as a compensable taking whenever the state imposes land use restrictions in order to safeguard the "public interest in health, the environment, and the fiscal integrity of

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approach. Yet, the result in Nollan makes more doctrinal sense using the 2-step approach. The Nollan Court found that requiring the property owner to grant an easement did not serve the purposes offered by the Coastal Commission to support the requirement. 107 S. Ct. at 3148-49. The Court could have invoked due process, invalidated the requirement as unreasonable, and then looked to see if, while effective, the easement requirement constituted a taking. Because an easement provides the public with actual use of the subject property, a compensable taking had obviously occurred.

the area." (Italics ours.) Keystone Coal Ass'n, 94 L. Ed. 2d at 490. This insulation from the takings analysis continues, even if the regulation denies a landowner all economically viable use of the property. First English Evangelical Lutheran Church, 107 S. Ct. at 2384-85.[23] We assume, however, that because the

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[23] In First English Evangelical Lutheran Church, Chief Justice Rehnquist's majority opinion identified "safety regulations" as insulated from characterization as a taking. 107 S. Ct. at 2384-85. A review of Supreme Court jurisprudence demonstrates that "safety regulations" include exercises of the police power intended to safeguard the following: (1) public health, see Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1897) (prohibition of the sale and manufacture of intoxicants); (2) the public interest in the environment, see Goldblatt v. Hempstead, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962) (prohibition against open pit excavations beyond certain depth to protect the water table); and (3) fiscal integrity of the community, see Miller v. Schoene, 276 U.S. 272, 72 L. Ed. 568, 48 S. Ct. 246 (1928) (no taking occurred when Virginia required cedar tree owners to cut down trees to prevent disease from destroying apple orchards, one of the key commercial industries in the state).

police power has its limits, even insulated regulations must withstand the due process test of reasonableness. See Goldblatt, 369 U.S. at 594-96; Mugler, 123 U.S. at 657.[24]

Where a regulation does not enjoy insulation from the takings claim, a regulatory taking can result if the regulation does not "'substantially advance legitimate state interests." Nollan, 55 U.S.L.W. at 5147 (quoting Agins v. Tiburon, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980)) or if the property owner suffers an economic deprivation significant enough to outweigh the public interest served by the

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[24]We also assume that whether the regulation is overly oppressive on the individual property owner depends on such factors as the nature of the harm sought to be avoided, the availability and effectiveness of less drastic protective measures, and the economic loss suffered by the property owner. Goldblatt v. Hempstead, 369 U.S. 590, 594-95, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962).

regulation. Keystone Coal Ass'n, 94 L. Ed. 2d at 492-93; accord, Maple Leaf Investors, at 733. If land-use regulations do not substantially advance a legitimate purpose, the lack of nexus between the regulation and the purpose sought to be served "converts that purpose to something other than what it was." Nollan, 107 S. Ct. at 3148.[25]

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[25]In Nollan, the Court did not explain why the lack of the necessary nexus should constitute a taking in and of itself. The Court found that hinging a building permit on the public receiving an easement did not serve any valid purpose for regulating the land. Nollan 107 S. Ct. at 3150. But the occurrence of the taking hinged on the nature of the encumbrance placed on the property owner, much like the second step in our due process/eminent domain approach. Absent the necessary nexus, the easement requirement amounted to the taking of a property right for public use without compensation, and thus was a taking. Nollan, 107 S. Ct. at 3151-53. If, for example, the lack of the necessary nexus resulted in a simple prohibition of some use, rather than an easement, would a taking still have occurred?

If the regulation substantially advances the legitimate public purpose, the Court looks to the significance of the economic deprivation, with the property owner's standard of proof varying according to the nature of the claim. In a facial challenge, the property owner must show that the challenged regulation denied all economically viable use of his or her property. Keystone Coal Ass'n, 94 L. Ed. 2d at 494-95. When the takings challenge concerns the application of the regulatory regime to a specific piece of property, as in Orion's case, the Court looks to the challenged regulation's economic impact and the extent of its interference with reasonable, investment-backed expectations. Keystone Coal Ass'n, 94 L. Ed. 2d at 494-95.

When a regulatory taking occurs, the proper remedy under either article 1, section 16 or the Fifth Amendment would

be just compensation. In First English Evangelical Lutheran Church, the Court rejected the California regulatory takings doctrine, under which claimants could seek invalidation, but not compensation damages. The Court reasoned that once a regulatory taking has in fact occurred, invalidation "is not a sufficient remedy to meet the demands of the Just Compensation Clause." First English Evangelical Lutheran Church, 107 S. Ct. at 2388. In requiring just compensation for regulatory takings, the Court recognized that its ruling "will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations." First English Evangelical Lutheran Church, 107 S. Ct. at 2389. Had the Court expressly adopted a 2-step due process/eminent domain approach it could

have provided land-use decision makers a clear signal as to when compensation would be required. The 2-step approach puts decision makers on notice that compensation would attach if the regulation went beyond preventing harm, to enhance a publicly owned right in land. This clear signal would lessen the intimidation of legislative bodies that the California Supreme Court believed would result from attaching strict financial liability to all regulations adopted in good faith, but subsequently determined to have effected a compensable taking. See Agins v. Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).[26]

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[26]Our due process/eminent domain approach differs substantially from the California approach invalidated in First English Evangelical Lutheran Church. California had limited the remedy for a regulatory taking to invalidation, rather than just compensation. Under our approach, when a regulation invalidated as a substantive due process violation

Even under the Supreme Court's approach, however, land-use decision makers have a guidepost, albeit a vague one, by which to gauge their actions. No compensable taking can occur as long as regulations substantially serve the legitimate public purpose of prohibiting uses of property injurious to the public interest in health, the environment, or the fiscal integrity of the community. At most, such regulations would be subject

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effects a taking for public use, just compensation must be paid. Justice Brennan feared that the California mere invalidation approach would allow overzealous officials the opportunity to pass subsequent unconstitutional regulations, subjecting the property owner to continued harassment and legal costs. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 655 n.22, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981) (Brennan, J., dissenting). Because of the protection afforded in RCW 64.40, we need not worry about potential harassment problems. The Legislature provided landowners with a cause of action whenever governmental land-use decision makers act arbitrarily, capriciously, recklessly, or with knowledge that their action was unlawful or exceeded authority. RCW 64.40.020.

to invalidation as an unreasonable burden, violative of substantive due process.

Certain aspects of our state regulatory takings doctrine appear to conflict with federal analysis. We believe whatever differences exist result from our willingness to expressly recognize the role of substantive due process. Under either analytical approach, regulations aimed at preventing injury to the public interest are subject to a substantive due process claim, rather than a regulatory takings challenge. Thus, the breadth of constitutional protection under the state and federal just compensation clauses remains virtually identical. Nevertheless, in order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal

analysis to review all regulatory takings claims, including Orion's.

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Orion has the heavy burden of overcoming the presumption of constitutionality accorded to government land-use regulations. Granat v. Keasler, 99 Wn.2d 564, 568, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983); accord, Keystone Coal Ass'n, 94 L. Ed. 2d at 493 ("heavy burden placed upon one alleging a regulatory taking"). Because of the unusual circumstances in this case, we have held that Orion's takings claim is ripe for review, despite the lack of a final decision by the local regulatory decision maker concerning uses allowed on Orion's property. See Williamson Cy. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

We can uphold the trial court's summary judgment in Orion's favor only if we conclude that no genuine issues of material fact exist concerning the three components of a regulatory takings claim: (1) whether the regulatory regime as applied to Orion's property scheme was insulated from a takings challenge as part of the State's authority to enact health and safety regulations, see Keystone Bituminous Coal Ass'n v. DeBenedictis, ___ U.S. ____, 94 L. Ed. 2d 472, 491-93, 107 S. Ct. 1232 (1987); Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 733, 565 P.2d 1162 (1977); (2) whether a compensable taking occurred because the challenged regulations did not substantially advance a legitimate public purpose or because they caused a sufficiently significant economic deprivation, see Keystone Coal Ass'n, 94 L. Ed. 2d at 492; Maple Leaf Investors,

at 731-32; and (3) whether the taking violated the constitution because any compensation offered by the State was not "just." Const. art. 1, § 16; see MacDonald, Sommer & Frates v. Yolo Cy., ____ U.S. ____, 91 L. Ed. 2d 285, 294, 106 S. Ct. 2561 (1986). Because we find that a variety of material factual issues remain unresolved as to all three components, we hold that summary judgment on the regulatory takings claim was improper. Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982).

1. Does the State merit insulation from a takings challenge?

Whether application of the regulatory regime to Orion's property merited insulation from a takings challenge was not expressly litigated at trial. This determination depends upon whether the public trust doctrine, the original enactment of the SMA and the SCSMMP, or

the creation of the Sanctuary proximately caused Orion's inability to make a profitable use of its land. See Alger v. Mukilteo, 107 Wn.2d 541, 730 P.2d 1333 (1987) (absent proximate cause there can be no taking). Although we have held that Orion could not obtain a permit to make any profitable use of its land, Orion still must demonstrate that its tideland property was reasonably adaptable, both economically and functionally, to some present, legally permissible, reasonably profitable use prior to enactment of the SMA and the SCSMMP. Department of Natural Resources v. Thurston Cy., 92 Wn.2d 656, 669, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980); Carlson v. Bellevue, 73 Wn.2d 41, 51, 435 P.2d 957 (1968). Identifying the existing, reasonably profitable uses will determine the proximate cause of Orion's problem. Unless the trial court

finds that the Sanctuary's creation proximately caused the alleged taking, the application of the SMA and SCSMMP to Orion's property merits insulation from characterization as a taking.

Orion purchased its property subject to the limitations imposed by the public trust doctrine. See section II, supra. Because of the trust's requirements, Orion's plans for a residential community or farmland, both of which required dredging and filling, never constituted a legally permissible use. Nor are the tidelands functionally adaptable to such uses. See e.g., State Wetlands Bd. v. Marshall, 127 N.H. 240, 247, 500 A.2d 685, 689 (1985); Just v. Marinette Cy., 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972). The trial court found that not all uses of Padilla Bay tidelands would substantially impair public navigational rights. Unfortunately, the court did not

identify these consistent uses, nor did the court enter a finding as to which of these uses, if any, could have been reasonably profitable on Orion's property. As we explained in our discussion of the public trust, see section II, supra, if the court determines on remand that Orion could make no reasonably profitable use of its land consistent with the public trust, no taking occurred.

If profitable uses did exist, the court must determine if the SMA and SCSMMP proximately caused the denial of use. The original enactment of the SMA and the SCSMMP left Orion with several possible uses: recreation, education, research, and aquaculture. Previously we concluded that only aquaculture constituted a reasonably profitable use of Orion's property. Orion Corp. v. State, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985). Although the record contains persuasive

evidence that Orion's property was suitable to use for aquaculture as a profitmaking venture, Orion disputes this conclusion with evidence sufficient enough to create an issue of material fact. This court's function does not include resolving existing factual issues. Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986). Thus, whether part of Orion's property was suitable for a commercial aquaculture venture, or to some other legally permissible, economically and functionally adaptable use, must be resolved on remand.

If aquaculture was not an economically viable use, and some other reasonably profitable use existed, then the original enactment of the SMA and the SCSMMP proximately caused Orion's difficulties. However, the SMA and SCSMMP qualified as a public health and safety regulation, insulated from characterization as a

taking, and thus subject to challenge only under substantive due process. As we have recognized previously, the SMA established a regulatory scheme to serve several purposes: (1) to safeguard the environment, Department of Ecology v. Pacesetter Constr. Co., 89 Wn.2d 203, 214, 571 P.2d 196 (1977); (2) to protect "against adverse effects" to the public health, safety and welfare, RCW 90.58.020; Nisqually Delta Ass'n v. DuPont, 103 Wn.2d 720, 732, 696 P.2d 1222 (1985); and (3) to ensure that development along state shorelines and waters does not adversely affect the general public trust rights of "navigation and corollary rights incidental thereto." RCW 90.58.020; see Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd., 92 Wn.2d 1, 4, 593 P.2d 151 (1979). As to Orion's specific property, the SMA designated Padilla Bay a shoreline of statewide

significance, RCW 90.58.030(2)(e)(ii)(E). The record persuasively establishes that Padilla Bay is subject to the public trust rights and that the public has an intense interest in prohibiting tideland uses that would endanger the ecological environment or threaten the fiscal integrity of the commercial fishing industry, a major contributor to the economic health and welfare of Washington's citizens.

Regulations safeguarding the public's interest in being protected from injurious uses would obviously be insulated from characterization as a taking. As the Supreme Court recognized in Mugler, and recently restated in Keystone Coal Ass'n, "'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community". Keystone Coal Ass'n, 94 L. Ed. 2d at 492 (quoting Mugler v.

Kansas, 123 U.S. 623, 665, 31 L. Ed. 205, 8 S. Ct. 273 (1897)). Thus, if, for example, Orion could make no reasonably profitable use of its property without injuring the public trust or the public's interest in health or in the environment, no compensable taking could have occurred. Likewise, if any profitable use of the tidelands would have harmed the critically important commercial fishing industry, the State could choose to protect the interest of "preponderant public concern" without having to pay compensation. Miller v. Schoene, 276 U.S. 272, 279, 72 L. Ed. 568, 48 S. Ct. 246 (1928) (no taking occurred when Virginia required diseased cedar trees be cut down to protect critically important apple orchards).

On the other hand, if Orion's property was adaptable to aquaculture, then the Sanctuary's creation proximately caused the denial of all reasonably profitable

use, and the SMA and the SCSMMP no longer merit insulation from Orion's takings challenge. As we have already explained, the Sanctuary's creation made it impossible for Orion to obtain a conditional use permit to pursue aquaculture on its property. See Orion I, at 459-60; see supra at 633. We have no doubt that the State created the Sanctuary in order to preserve and protect the vitally important role Padilla Bay plays in maintaining a healthy Washington. Nevertheless, application for a conditional use permit did not become futile because of the need to protect the public from harm. Rather, a permit could never issue because any reasonably profitable use was incompatible with use of the Sanctuary for research, education, and nonintensive recreation, the only preexisting uses in the area. See Orion I, at 459-60. As applied to Orion's property, the regulatory scheme's

purpose was no longer to safeguard the public health or safety, but rather to protect the preexisting uses in the area. Consequently, if aquaculture was an economically viable use, the Sanctuary proximately caused the denial of a conditional use permit, and the State cannot "avoid the conclusion that a compensable taking had occurred by establishing that th. denial of all use was insulated as a part of the State's authority to enact safety regulations." First English Evangelical Lutheran Church, 107 S. Ct. at 2384-85; see also Maple Leaf Investors, at 733.

Whether the state's regulatory regime merits insulation from characterization as a taking depends upon the resolution of a variety of factual disputes. Consequently, we remand for the trial court to determine, in light of the public trust doctrine, whether Orion's land was

adaptable to any legally permissible, reasonably profitable uses, and if so whether the SMA and the SCSMMP or the Sanctuary's effect on the regulations proximately caused the denial of such uses.

2. Has a Compensable Taking Occurred?

If the trial court determines that the State cannot claim insulation from Orion's takings challenge, a compensable taking may have occurred. Orion must demonstrate either that the regulations do not substantially advance a legitimate governmental purpose, Nollan v. California Coastal Comm'n, ___ U.S. ___, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), or that the limitations placed on the use of its property caused a sufficiently significant economic deprivation. See Keystone Coal Ass'n, 94 L. Ed. 2d at 492; Maple Leaf Investors, at 731-32. As in Nollan, Orion challenges the nexus between the

public purpose and the application of the regulatory scheme to its property. In Nollan, the Supreme Court held that by requiring the property owner to grant the public an easement, local decision makers had sought to gain a public use without paying compensation. Nollan, 107 S. Ct. at 3150. Here, Orion claims that the regulatory regime sought to accomplish a "condemnation" without resort to the legally mandated process. Orion characterizes the SMA, the SCSMMP, and the willing seller approach to Sanctuary acquisition as reflecting a state policy to preserve Padilla Bay in its natural state, without using the more expensive condemnation route. We disagree.

Though the SMA and the SCSMMP evidence the State's attempt to preserve Padilla Bay, see Orion I, at 457, prior to the Sanctuary the regulations allowed for some economic uses consistent with the

preservation goal.[27] While the Sanctuary may have triggered the alleged taking, we do not perceive use of the willing seller approach as an attempt to avoid condemnation proceedings. Tideland owners could either accept or reject the purchase offer without threat of a subsequent condemnation proceeding. Formulation of this strategy resulted from the State's belief that no taking occurred due to the continued viability of aquaculture and from the relatively small amount of acquisition money available.[28] Furthermore, the State concluded that while aquaculture would be allowed, Orion

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[27]See our discussion supra, at footnotes 4 and 5. See also Nisqually Delta Ass'n v. DuPont, 103 Wn.2d 720, 729-33, 696 P.2d 1222 (1985).

[28]Throughout these proceedings Orion has claimed the State must pay, at minimum, $6 million for the tideland property, a value based on a use precluded by the public trust (farm value of $1,200 per acre). Yet, the total budget for Sanctuary acquisition was approximately $4 million.

could make no other use of its land that would not unreasonably harm the ecosystem. We find Orion's challenge to the nexus between the regulatory regime and the State's purpose without foundation.

A compensable taking may have occurred, however, if Orion suffered a significant economic deprivation as a result of the Sanctuary's effect on Orion's ability to make some present, reasonably profitable use of its property. The extent of the economic deprivation depends upon two factors: (1) the economic impact caused by the denial of any profitable use, Keystone Coal Ass'n, 94 L. Ed. 2d at 494-95; Department of Natural Resources v. Thurston Cy., supra; and (2) the extent to which the denial of profitable use interfered with reasonable, investment-backed expectations, Keystone Coal Ass'n, 94 L. Ed. 2d at 494-95.

Even assuming Orion's tidelands were adaptable to aquaculture, the extent of the regulation's economic impact depends upon more than the denial of any immediate profitable use. Property includes a bundle of rights with respect to the physical thing. The bundle includes the right to possession and to exclude others, the right to use and enjoyment, and the right to dispose of the thing itself. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); Lange v. State, 86 Wn.2d 585, 590, 547 P.2d 282 (1976). Where an owner possesses a full bundle of property rights, the regulatory scheme's economic impact is determined by viewing the bundle in its entirety. See Keystone Coal Ass'n, 94 L. Ed. 2d at 496-97.

None of these "fundamental attributes of ownership" have been extinguished.

See Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). Even if the State has denied Orion's right to make a present, reasonably profitable use of its property, the regulations continue to allow Orion to use its tidelands for education, research, and nonintensive recreation, Orion I, at 459; uses that other parties may consider extremely valuable. Orion's right to dispose of its property and to exclude others also remains unaffected. Thus, the significance of the economic deprivation suffered by Orion depends upon the effect the denial of all use had on the property's fair market value and Orion's ability to realize that value through a sale to a party other than the government. See Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986).

The trial court did not determine whether Orion's property retained a reasonable fair market value. The reasonableness of the retained fair market value depends upon whether the retained value approximates that which would have resulted if Orion had been permitted to make a legally permissible, possible and reasonably profitable use.[29] Unfortunately, we cannot determine from the record whether Orion has a possibility of realizing a fair market value through a sale of its property to a nongovernmental buyer. The State and Orion dispute the extent to which the Sanctuary impacted the

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[29]This determination differs from that required when a party bases its takings claim solely on the effect a regulation has on property values, rather than on a denial of all profitable use. A "property value" takings claim requires a showing that a regulation destroyed the property's entire value, or only a bare residual value remains. MacLeod v. County of Santa Clara, 749 F.2d 541 (9th Cir. 1984); see also Buttnick v. Seattle, 105 Wn.2d 857, 862, 719 P.2d 93 (1986).

market value and the record is silent as to whether Orion has a present possibility of a sale to a party other than the government. Resolution of these factual questions necessitates remand to the trial court.

As to the extent of the economic deprivation caused by interference with reasonable, investment-backed expectations, we conclude that remand is unnecessary. The record clearly demonstrates that if Orion developed any reasonable investment-backed expectations, they extended only to the proposed dredge and fill projects, which the public trust precluded. Orion never made any property improvements based on an expectation of making a legally permissible use of the property. Although we find that the regulations did not interfere with Orion's investment-backed expectations, the significance of the economic impact remains undetermined and

the subject of dispute among the parties. Therefore, summary judgment was improper. See Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982). We remand for the trial court to determine the extent of the economic deprivation caused by the denial of all present, reasonably profitable uses.

3. The Proffered Compensation.

Like article 1, section 16, the fifth amendment to the United States Constitution, "does not proscribe the taking of property; it proscribes taking without just compensation." Williamson Cy. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). Thus, even if we assume that the creation of the Sanctuary effected a regulatory taking, a constitutional violation does not result unless Orion establishes that the proffered compensation, if any, was not just.

Hamilton Bank, 473 U.S. at 194; MacDonald, Sommer & Frates v. Yolo Cy., ___ U.S. ____, 91 L. Ed. 2d 285, 294, 106 S. Ct. 2561 (1986). Local agencies charged with administering land-use regulation have a variety of compensation tools at their disposal including authorizing alterations, remitting taxes, and transferring development rights. MacDonald, Sommer & Frates, 91 L. Ed. 2d at 295. Here, however, the proffered compensation came in the form of an offer by the State to purchase the property for inclusion in the Sanctuary.

We recognize that allowing government entities to vindicate inverse condemnations by offers to purchase could be viewed as, in effect, putting a premium on avoiding the legislatively designed method for exercising eminent domain and its focus on fair procedures. See RCW Title 8. However, we have already rejected Orion's

contention that the SMA, the SCSMMP, and the adoption of the willing seller strategy evidenced a state intent to accomplish a taking without resort to eminent domain procedures. Absent governmental intent to circumvent condemnation proceedings, the statutorily prescribed procedural protection will not be thwarted by considering the sufficiency of state offers to pay compensation when a subsequently filed action alleges a regulatory taking.

An eminent domain proceeding consists of three phases: adjudication of public use and necessity; determination of compensation; and payment of award with entry into possession. State ex rel. Lange v. Superior Court, 61 Wn.2d 153, 156, 377 P.2d 425 (1963). Where the claimant alleges an inverse condemnation by excessive regulation, a court implicitly makes a public use and necessity

determination by finding that the regulation substantially advances a legitimate public purpose. Requiring the court to determine whether the proffered compensation is just provides protection equivalent to the second eminent domain determination. If the trial court determines that the compensation offered is not just, then a statutorily authorized damage proceeding would set the appropriate compensation. See, e.g., RCW 8.04.092.

The State based its purchase offer on its consistently held view that the public trust doctrine, as implemented by the SMA and the SCSMMP, barred Orion's plan to dredge and fill the tidelands. Recognizing that the SMA, and later the SCSMMP, seriously affected Orion's development expectations, the State repeatedly offered to purchase Orion's tidelands for a market value based on use of the property for aquaculture. We have

already rejected Orion's contention that the SMA, the SCSMMP, and the adoption of the willing seller strategy evidenced a State intent to avoid eminent domain procedures. Consequently, no unconstitutional taking has occurred if the State's final offer to purchase was just in light of the property's fair market value and if the State continues to honor its purchase offer. As we have explained, a factual dispute exists concerning the fair market value of Orion's property in light of the public trust and other state and federal regulations applicable prior to the Sanctuary. Therefore, we remand for the trial court to determine whether the proffered compensation was just.

4. The Appropriate Remedy and Measure of Damages.

The trial court has already ruled that the regulations effected a permanent,

rather than a temporary, taking, and set the diminution of value caused by the Sanctuary's creation as the appropriate measure of damages. In challenging the trial court's characterization of the taking as permanent, the State argues that it should have the opportunity to cure any taking by amending the regulations to allow Orion a profitable use or by rescinding the Sanctuary. We agree.

Where a regulation results in a taking by denial of all use, the regulation is invalid, but the state and federal constitutions require the government to pay just compensation - for the period during which the regulation was effective. See First English Evangelical Lutheran Church, 107 S. Ct. at 2389. Once a taking has been established, "the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation,

or exercise of eminent domain." First English Evangelical Lutheran Church, 107 S. Ct. at 2389. This view of the appropriate remedy conforms with our own nonregulatory inverse condemnation cases, where we have observed that when a taking is not complete, forcing the governmental entity to either condemn the land or abandon the public use is a particularly appropriate remedy. Brazil v. Auburn, 93 Wn.2d 484, 495, 610 P.2d 909 (1980).

We conclude that the trial court erred in characterizing the alleged taking as complete and permanent. If a taking by excessive regulation has occurred, the "damage" to Orion's property is temporary and reversible. We reject Orion's contention that the State and County have acted so oppressively, and have so destroyed the value of the tidelands, that this court should view the taking as permanent and complete. See, e.g., Althaus

v. United States, 7 Cl. Ct. 688 (1985). Cases such as Althaus do not apply under these circumstances. There, the claimant could not sell its land because the federal government had announced an intention to acquire the land for nearly 10 years, using the threat of condemnation to drive down the price. Here, the effects of the Sanctuary can be cured either by amending the regulations or by abandoning the Sanctuary.

If on remand the trial court determines that an unconstitutional, compensable taking has occurred, the court should proceed to the damage setting phase of its deliberations. The measure of damages must fully compensate Orion for what it has lost. Lange v. State, 86 Wn.2d 585, 590, 547 P.2d 282 (1976). We agree with the Supreme Court that the proper measure of damages for a "temporary" regulatory taking would be the leasehold

value of the land for the period during which the regulation remained effective. First English Evangelical Lutheran Church, 107 S. Ct. at 2388.

E

Because material factual issues remain unresolved as to each component of the regulatory takings test, summary judgment on the regulatory takings claim was improper. We therefore remand to the trial court to make the following factual findings:

> 1. In light of the public trust doctrine, did Orion ever have a reasonably profitable use that was economically and functionally adaptable to the tideland property;
>
> 2. If Orion had one or more reasonably profitable uses, did the original enactment of the SMA and the SCSMMP proximately cause the denial of all such uses, thereby insulating the State from a takings challenge; or did a profitable use remain (for example, aquaculture), making the creation of the Sanctuary the proximate cause of the alleged taking;
>
> 3. If the Sanctuary was the proximate cause, did a compensable

taking occur, that is did the denial of all present profitable uses prevent Orion from realizing the property's reasonable fair market value through a sale to a nongovernmental buyer; and

4. If a compensable taking occurred, did the State offer just compensation?

If an unconstitutional taking has occurred, the trial court should set damages, but in a manner that seeks to protect Orion from incremental decisionmaking. The decision of whether to cure the taking or maintain the status quo by the exercise of eminent domain is a legislative prerogative. Therefore, if the State chooses to cure the taking by amending the regulations to allow Orion a profitable use, the trial court should review the State's proposed changes to determine whether the temporary taking would in fact be cured. Regardless of whether the State chooses to cure by amendment or rescission, or chooses to exercise its power of eminent domain, an

unconstitutional regulatory taking triggers the procedures for awarding attorney fees and costs pursuant to RCW 8.25.070.

IV

OTHER TAKING CLAIMS

In addition to a taking by excessive regulation, Orion claimed a taking under two additional theories: physical invasion and oppressive precondemnation conduct. The trial court concluded that no material facts were in dispute and dismissed both theories on summary judgment. We agree.

TAKING BY PHYSICAL INVASION

A per se taking occurs whenever government causes its agents or the public to regularly use or permanently occupy property known to be in private ownership. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 n.5, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). Orion claims it has produced sufficient evidence of a physical invasion to

withstand summary judgment. In support of its claim, Orion points to promotional materials prepared during the initial stages of Sanctuary development, and still available today, depicting all of Padilla Bay, including Orion's property, as within the Sanctuary. Orion also argues that a physical invasion occurs because its property is part of the same ecological unit as the State's property.

Orion's claim is untenable. At minimum, a plaintiff must demonstrate a chronic and unreasonable pattern of behavior by the government to support a claim for inverse condemnation by physical invasion. Schultz v. United States, 5 Cl. Ct. 412 (1984). The record, however, contains no specific instances of trespass caused by the State, which has taken affirmative steps to prevent trespass. Clerk's Papers, at 1320. We agree with the trial court that the "undisputed

facts demonstrate no physical invasion of plaintiff's tidelands by defendants." Clerk's Papers, at 2126.

B

TAKING BY OPPRESSIVE PREACQUISITION CONDUCT

Orion cites no Washington case law to support its claim that the government can unconstitutionally take private property by "oppressive preacquisition conduct." Apparently, California has recognized a cause of action for inverse condemnation when a "diminution in market value resulted from 'unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation . . .'" Jones v. People ex rel. Dep't of Transp., 22 Cal. 3d 144, 151, 583 P.2d 165, 148 Cal. Rptr. 640 (1978) (quoting Klopping v. Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972)). In support of our recognizing

this new cause of action, Orion cites state statutes that set policy guidelines for agencies acquiring real property during the course of condemnation proceedings. RCW 8.26.180(7), (8). "The acquiring agency shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." RCW 8.26.180(8).

At this time, we do not choose to recognize this new cause of action. Even if we had, Orion has offered no evidence capable of withstanding summary judgment. Here there has been no announcement of intent to condemn and no condemnation proceedings have been instituted. Moreover, we find a lack of credibility in Orion's claim that the State circumvented the constitution and the Legislature's guidelines under the guise of a willing seller concept. As we have

already explained, Ecology made a prudent choice in adopting a "willing seller" approach, rather than condemnation. As to other examples of oppressive conduct, the trial court correctly concluded that "the undisputed facts demonstrate . . . no abusive preacquisition activity on the part of the defendants which would amount to an unconstitutional taking of [Orion's] property." Clerk's Papers, at 2126.

V

FEDERAL CIVIL RIGHTS CLAIM

Orion also brought an action under 42 U.S.C. § 1983. At trial, the court granted the State and County summary judgment on the § 1983 claim. An action for inverse condemnation caused by excessive governmental regulation is cognizable under 42 U.S.C. § 1983. See Williamson Cy. Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

While the trial court did not explain its dismissal of Orion's § 1983 action, it apparently relied upon Hamilton Bank. There, the Supreme Court explained that "if a State provides an adequate procedure for seeking just compensation," a claimant may not file a § 1983 takings claim "until it has used the [state] procedure and been denied just compensation." Hamilton Bank, 473 U.S. at 195. At minimum, we read Hamilton Bank as requiring Orion to complete the available and adequate Washington inverse condemnation proceedings before filing a § 1983 action alleging an unconstitutional taking by excessive regulation. 473 U.S. at 194 n.13. Consequently, the trial court correctly dismissed Orion's § 1983 claim as not yet ripe.

CONCLUSION

Because material factual issues remained unresolved, summary judgment on

Orion's regulatory takings claim was improper. Specifically, we dismiss the County, which acted solely in its capacity as the State's agent. As to the State, we remand for the trial court to make several factual determinations concerning the public trust doctrine and the various components of the federal regulatory takings test. We affirm the trial court on all other issues.

PEARSON, C.J., BRACHTENBACH, CALLOW, GOODLOE, and DURHAM, JJ., and WILLIAMS, J. Pro Tem, concur.

ANDERSON, J., concurs in the result.

DORE, J. (dissenting)--While I have reservations concerning the majority's analysis of substantive due process violations and regulatory takings, I believe the court need not reach these issues. The majority holds that Orion's taking claim is ripe for review. Majority, at 633. I disagree. Neither Skagit County

nor the State has ever issued a final decision regarding the application of the Shoreline Management Act of 1971 (SMA), the Skagit County Shoreline Management Program (SCSMMP) or the Padilla Bay Estuarine Sanctuary (Sanctuary) to Orion's property. Absent a final decision by the County or State as to how these regulations apply to Orion's property, a proper determination of whether a taking has occurred cannot be made.

The United States Supreme Court has consistently held that a regulatory takings claim is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. MacDonald, Sommer & Frates v. Yolo Cy., ___ U.S. ___, ____, 91 L. Ed. 2d 285, 294-95, 106 S. Ct. 2561 (1986), Williamson Cy. Regional Planning Comm'n v. Hamilton

Bank, 473 U.S. 172, 186, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). Generally, to state a regulatory takings claim a property owner must first establish that the regulation has in substance "taken" property--that is, that the regulation "goes too far". Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922); Hamilton Bank, at 186. Determining whether a regulation has gone "too far" depends, in significant part, upon an analysis of the economic impact of the challenged regulation and the extent to which it interferes with reasonable investment-backed profit expectations. Hamilton Bank, at 190-91. It is impossible to accurately evaluate these factors "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Hamilton Bank, at 191.

Here, Orion has never once filed for a substantial development permit or a variance. Neither the County nor the State has ever been given an opportunity to determine how the SMA, SCSMMP or the Sanctuary applies to Orion's property. Thus, we have no way of knowing whether the harm inflicted by these regulations is severe enough to lead to the conclusion that they "go too far". Until we know the parameters of what Orion can and cannot do with its property, a regulatory takings claim is premature.

The majority opinion concludes that Orion's claim is postured for review because an application for an aquaculture conditional use permit would be futile. The majority assumes that our earlier decision in Orion Corp. v. State, 103 Wn.2d 441, 459, 693 P.2d 1369 (1985) which held that the existence of the Sanctuary would require denial of such a

permit is still correct. I disagree. The trial court was presented with evidence of changed circumstances that warrant a reappraisal of the possible uses of Orion's property. In particular, an affidavit from the section head of the Shoreland Management Section, Washington State Department of Ecology, concluded that aquaculture would be permitted in Padilla Bay. The changed circumstances indicate that aquaculture may not only be consistent with the general purpose of the SMA; but also, aquaculture may be compatible with the existence of the Sanctuary.

Furthermore, while our original decision in Orion seemed to indicate that Orion could not receive a variance, the changed circumstances may also allow Orion to receive such a variance. If

this were possible, then Orion could obtain a profitable use of its property.[30]

CONCLUSION

I believe Orion's regulatory taking claim is premature. Without a final administrative decision on the effect of the regulations at issue here on Orion's property, it is impossible to tell whether the property has retained any reasonable beneficial use or whether investment-backed expectations have been destroyed. Accordingly, I would reverse the trial court's decision granting Orion's motion for summary judgment on its regulatory takings claim.

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[30]I further note that while the specter of financial liability may prevent a county from enacting certain beneficial land use regulations, a variance procedure may ameliorate this risk. The Skagit County ordinances allowed for a variance whenever to do otherwise could result in a "taking" on the property owner concerned. SCSMMP § 10.03(e). Had the State argued this again in this case, the result may have differed. In any event, I still believe a remand on this issue would be equitable.

APPENDIX B

103 Wash. 2d 441, 693 P.2d 1369

[No. 49941-1]
[En Banc. January 11, 1985.]

THE ORION CORPORATION,
Respondent, v.
THE STATE OF WASHINGTON, ET AL,
Petitioners.

UTTER, J., concurs by separate opinion; DORE, J., dissents by separate opinion; DOLLIVER, ANDERSEN, and CALLOW, JJ., did not participate in the disposition of this case.

Nature of Action: A landowner owning most of the property within a designated estuarine sanctuary sought damages from the State and County under theories of inverse condemnation, unreasonable interference with property rights, and on other grounds.

Superior Court: The Superior Court for Skagit County, No. 82-2-00391-6, Walter J. Deierlein, Jr., J., on May 31,

1983, refused a summary judgment dismissing on the grounds that the landowner had not exhausted its administrative remedies.

Supreme Court: Holding that the landowner had standing and that the exhaustion of administrative remedies was a futile effort, the court affirms the denial of the summary judgment.

Kenneth O. Eikenberry, Attorney General, Charles B. Roe, Jr., Senior Assistant, and Wick Dufford, Assistant, for petitioner State.

William C. Smart, Henry Elsen, Keller, Rohrback, Waldo, Hiscock, Butterworth & Fardal, C. Thomas Moser, Prosecuting Attorney, and John Moffat, Chief Civil Deputy, for petitioner Skagit County.

Hillis, Phillips, Cairncross, Clark & Martin, P.S., by Mark S. Clark and James J. Ragen, for respondent.

BRACHTENBACH, J.--Padilla Bay lies

east of Anacortes, Washington. It is an area of approximately 11,000 acres.

The uncontroverted record discloses fascinating details about this tidal land. The bay contains probably the largest and least disturbed stand of eelgrass on the West Coast of the United States with 73 percent of the bay covered by eelgrass beds. It supports the largest known wintering population of peregrine falcons in North America. Bald eagles winter in the area. Raptores are uniquely abundant. Merlin and snowy owls are frequently seen. Approximately 50,000 ducks of 26 species winter there. Over 200 species of birds have been observed, making Padilla Bay one of the most diverse areas for bird life in the state.

Its spring population of brants is the largest on the West Coast of the United States. The bay is the most important spring staging area for the

Pacific flyway. The bay is critical because it is here that the brant build premigratory fat reserves before departing on their nonstop flight to Alaska. If Padilla Bay and the rich eelgrass beds it supports were not available, the Pacific flyway population of brant would be greatly impacted.

It is an important spawning ground for a variety of fish, including herring, flatfish, various bait fish and salmonids. Harbor seals sport in the bay. Herons feed throughout the bay. The bay is also a nursery for dungeness crabs which are fished commercially.

In short, the Padilla Bay estuary is recognized as the most diverse, least disturbed, and most biologically productive of all the major estuaries on Puget Sound. In view of the foregoing, it is not surprising that when the State enacted the Shoreline Management Act of 1971, RCW

90.58.010 et seq., the Legislature specifically classified Padilla Bay as one of five shorelines of statewide significance. See RCW 90.58.030(2)(e)(ii)(E).

Eighty percent of the tidelands of Padilla Bay are under the private control of the plaintiff The Orion Corporation (hereinafter Orion). Unfortunately, Orion's plans for their holdings conflicted with the State's plans for Padilla Bay. That conflict led to this lawsuit and appeal.

In 1982, Orion sued the State, a number of state officials, Skagit County and its county commissioners. Plaintiff alleged five causes of action: (1) inverse condemnation; (2) an arbitrary and unreasonable interference with plaintiff's use of property violative of due process; (3) denial of equal protection by imposition of restrictions more burdensome than those upon others similarly situated;

(4) a breach of obligation contained in a deed from the State; and (5) a 42 U.S.C. § 1983 violation. Plaintiff also sought attorney's fees under 42 U.S.C. § 1988 and RCW 8.25.075.

The defendants moved for summary judgment, arguing principally that Orion had failed to exhaust available administrative remedies. The trial court denied the defendants' motion, holding that Orion had proven conclusively, by uncontroverted facts, that pursuing the available administrative procedures would be futile and impractical. We granted discretionary review and affirm.

I

The dispositive issue is whether the plaintiff must first exhaust the available administrative remedies before instituting this action.[1] To decide that issue a

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[1] Citing Patsy v. Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982), Orion argues that

rather lengthy factual analysis, drawn from the comprehensive record compiled by Orion, is necessary.

The regulatory process that currently affects Orion's Padilla Bay holdings is complex. The following programs impact any development plans for Padilla Bay:

Padilla Bay Estuarine Sanctuary;

Coastal Zone Management Act of 1972 (16 U.S.C. § 1461);

Shoreline Management Act of 1971 (RCW 90.58);

Skagit County Shorelines Management Master Program;

Washington State Coastal Zone Management Program.

This list is not exclusive. Pertinent sections of the various programs and the history of this case are summarized below.

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it need not exhaust available administrative remedies before litigating its 42 U.S.C. § 1983 claim. Due to our disposition of this case we need not decide this issue.

In the 1960's Orion began acquiring the second class tidelands in Padilla Bay. Padilla Bay is composed of such tidelands. Ultimately, Orion acquired approximately 5,600 acres in fee and held options on an additional 3,500 acres. Thus, it owned or held options on 80 percent of Padilla Bay. At the time of the initial acquisition, these tidelands were not zoned.

Orion acquired this property with a plan to establish a residential Venetian style community, estimated to ultimately have a population of 30,000, with supporting retail, commercial and recreational facilities. Orion completed detailed concept planning and engineering studies to check physical development feasibility. Orion's detailed plans called for a combined dredge and fill operation to create the community. Needless to say, such an enterprise would have significantly

altered the environmental character of Padilla Bay.

Before Orion could proceed with its development plans, the State enacted the Shoreline Management Act of 1971, Laws of 1971, 1st Ex. Sess., ch. 286, § 1, p. 1496, codified at RCW 90.58.010 et seq. (hereinafter SMA). The SMA mandated that local governments develop master programs for shorelines within their jurisdictions. These programs were subject to Department of Ecology (hereinafter Ecology) approval and, once approved, were to become the regulations for state shorelines. The act authorized Ecology to develop guidelines to serve as interim regulations. Ecology's guidelines were also designed to guide the formation of each local master program. RCW 90.58.050-.100.

The Legislature delineated use preferences to guide the formation of both Ecology guidelines and local master

programs. Of particular importance are the legislative declarations for shorelines of statewide significance.

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the state-wide interest over local interest;
>
> (2) Preserve the natural character of the shoreline;
>
> (3) Result in long term over short term benefit;
>
> (4) Protect the resources and ecology of the shoreline;
>
> (5) Increase public access to publicly owned areas of the shorelines;
>
> (6) Increase recreational opportunities for the public in the shoreline;
>
> (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

(Italics ours.) RCW 90.58.020.

Padilla Bay, as a shoreline of statewide significance, is subject to these seven use preferences. As will become evident, the State has made a policy choice for Padilla Bay that accords with the italicized use preferences: to recognize and protect the statewide interest, preserve the natural character of the bay, and protect its resources and ecology.

Ecology's development guidelines/ interim regulations applicable to shorelines of statewide significance state:

> Because these shorelines are major resources from which all people in the state derive benefit, the guidelines and master programs must give preference to uses which favor public and long-range goals.

WAC 173-16-040(5). The section further provides that areas containing unique or fragile natural resources should be left undeveloped. See WAC 173-16-040(5)(d)(i).

General development guidelines for estuaries state:

> An estuarine area left untouched by man is rare since historically they have been the sites for major cities and port developments. Because of their importance in the food production chain and their natural beauty, the limited estuarial areas require careful attention in the planning function. Close scrutiny should be given to all plans for development in estuaries which reduce the area of the estuary and interfere with water flow.

(Italics ours.) WAC 173-16-050(5).

Orion abandoned its Venetian style development plans without submitting a permit application. Orion believed these plans were precluded by the passage of the SMA in 1971. Statements by state, county and federal officials supported that belief. In 1973, the then director of the Skagit County planning department, testified that development of Orion's property would be impossible at that time as the SMA would prevent any development. In 1974, the Department of Game opposed

the renewal of a private individual's permit to remove sand and gravel from the bed of Padilla Bay. A department official noted that with passage of the environmental acts and the classification of Padilla Bay as a shoreline of statewide significance, it was doubtful that the individual's development plans would be carried out. The official closed his letter by saying that "[b]ecause of the substantial impact that development in Padilla Bay would have on the fish and wildlife resources of the area, the Department of Game will strongly oppose any such project."

In 1975, the Board of Skagit County Commissioners sent a letter to the United States Fish and Wildlife Service (hereinafter USFWS) regarding relocation of a lime company. The Board therein expressed its policy concerning industrial expansion into Padilla Bay.

> Be assured that the Board of Commissioners of Skagit County has no intention whatsoever of allowing industry to expand into the prime agriculture areas of the county, nor into the critical areas of Padilla or Skagit Bays.

(Italics ours.)

In April of 1976, a USFWS biologist, Brian Sharp, filed a trip report regarding potential uses for Padilla Bay. The Skagit County planning department informed Sharp that its director, Bob Schofield, was on record as saying that the only use for the bay would be aquaculture. Mr. Schofield is also director of the Skagit County permit center and a Skagit County hearing examiner. In those capacities, he reviews applications for substantial development permits under the Skagit County Shoreline Management Master Program. The Department of Game told Mr. Sharp that for years Padilla Bay had been the State's number one acquisition property and asked how the Department

could help protect the bay. The chief of planning for the Army Corps of Engineers told Mr. Sharp that the Corps' reaction to Orion's development plans would be negative.

Orion's belief that development of Padilla Bay was foreclosed was reinforced when Ecology approved and adopted the Skagit County Shoreline Management Master Program (hereinafter SCSMMP) on October 5, 1976. See WAC 173-19-370. At that point the SCSMMP became the principal, though not exclusive, land use plan applicable to Orion's property. The SCSMMP designated Orion's property as aquatic. Orion's Venetian style development plans were foreclosed because commercial and residential developments are prohibited in aquatic areas. SCSMMP ch. 7.03(2)(A)(6), (B)(1); ch. 7.13(2)(A)(6). David Rodney Mack, assistant director of Ecology, testified in his deposition that Padilla

Bay is an estuary, is a unique area and is one of the most biologically productive areas in the Puget Sound. Therefore, the SCSMMP's use categories for aquatic areas, and estuaries in particular, are summarized in the appendix.

As this summary indicates, the only permitted use of Orion's property under the SCSMMP is less intensive, nonstructural and nonextractive recreational activities. As a shoreline of statewide significance, aquaculture would be allowed but only if an applicant could first obtain a conditional use permit. All other potential uses either "should not" be allowed in estuaries or are "prohibited" in aquatic or estuary areas.

In June of 1976, just prior to adopting the SCSMMP, Ecology issued the Washington State Coastal Zone Management Program (hereinafter WSCZMP). This program also impacts Orion's land. The program

was in response to the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, which authorized federal grants to encourage and assist coastal states in the development of management programs for the land and water resources of its coastal zone. (Italics ours.) 16 U.S.C. §§ 1452, 1454.

Under the WSCZMP certain areas of the state were designated as areas of particular concern.

> The . . . principle used here for identification of areas of particular concern is that such areas must be of greater than local interest and offer a live issue of competing uses and management options. More specifically, selection of the areas below has been guided by the following criteria: (1) the area contains a resource feature of environmental values considered to be of greater than local concern or significance; (2) the area is given recognition as of particular concern by state or federal legislation, administrative and regulatory programs, or land ownership; and (3) the area has the potential for more than one major land or water use or has a resource being sought by ostensibly incompatible users.

(Italics ours.) WSCZMP, at 12. Padilla Bay was included as one area of particular concern. WSCZMP, at 12.

The WSCZMP stated that "[t]he estuary of the Skagit River [Padilla Bay] is the most diverse, least disturbed, and most biologically productive of all the major estuaries on Puget Sound." WSCZMP, at 16. The program also noted indirectly Orion's ongoing interest in Padilla Bay:

> While there would appear to be few threats to the protection of these valuable wetlands [Skagit and Padilla Bays], there remain some concerns. . . . [P]lans have been developed several times for diking the area, first for farming and later for industrial development. In fact, detailed plans that have now been abandoned were even developed for a combined dredge and fill operation to create a Venice-style residential area.

WSCZMP, at 17. While the WSCZMP designated Padilla Bay as an area of particular concern, it imposed no overlay of regulation itself, and thus imposed no use restrictions on Orion's property. However,

coupled with the SMA, this program is direct evidence that Padilla Bay (Orion's property) is recognized as an area that contains a resource feature of environmental value that is of greater than local concern. See RCW 90.58.020(1).

The net effect of these developments was that Orion's property in Padilla Bay, which had originally been sold as unzoned tidelands for commercial development, was designated by name as a shoreline of statewide significance under the SMA, recognized as an area of particular concern under the Washington State Coastal Zone Management Program, and designated as aquatic under the SCSMMP, with commercial and residential development prohibited.

Orion's efforts at finding alternative uses for its land proved fruitless. It analyzed diking its property and turning it into farmland. It found this to be an economically feasible plan but was informed

by state and county officials that it would not be issued permits for that development. Agricultural use is not permitted in aquatic areas under the SCSMMP. SCSMMP ch. 7.01(2)(A)(6). No permit application for this potential project was filed. Orion also investigated clam harvesting, oystering or harvesting eelgrass and other forms of marine aquaculture. Aquaculture is a conditional use in aquatic shorelines of statewide significance. SCSMMP ch. 7.02(2)(A)(6)(3), (B)(11). Studies indicated that these plans were not economically feasible. Similarly, no permit application was filed.

Finally, Orion considered selling its land to the State. Ecology, lacking funds for acquiring Orion's property, asked the USFWS to include the purchase in the federal list of western purchases. The USFWS responded:

> I would be less than candid with you if I did not share the

> current thinking of the concerned Bureaus that the combination of existing State and Federal regulations, as they are presently implemented, should adequately protect the ecological resources of Padilla Bay. Even if the various State permits were somehow acquired to dike and develop this area, the non-water-dependent nature of the proposed Orion development (agricultural) would almost certainly preclude the issuance of a Corps of Engineers Section 10 or 404 permit, according to my information.
>
> Of course, the requirements and relative strength of existing laws may change in the future and become less effective. Should this occur, and the area becomes significantly more threatened, Federal acquisition would certainly be more actively considered as an immediate priority.

Letter from Juanita Alvarez, special assistant to the assistant secretary for Fish and Wildlife and Parks, to Wilbur G. Hallauer, Director of Ecology. Thus, the USFWS refused to fund any acquisition plans.

The existing state and federal regulations to which Ms. Alvarez referred were considerable. Besides the aforementioned programs, any development of

Orion's property would require permits from the Army Corps of Engineers. See, e.g., the federal Water Pollution Control Act, 33 U.S.C. § 1344; see also Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403. Review of Corps permits is performed by the local governmental jurisdiction in which the permit is being sought as well as by seven state agencies. Ecology coordinates the review process. WSCZMP, at 27. Corps of Engineers regulations provide that when state and/or local permit applications are denied, the Corps will also deny the applications. See 33 C.F.R. § 320.4(j) (1983). Orion's property was also subject to programs jointly administered by the Department of Fisheries and the Department of Game. See, e.g., RCW 75.20.100 (hydraulic project approval program), see also WAC 220-110-010 et seq. (hydraulic code rules). Additionally, the State Environmental

Policy Act of 1971, RCW 43.21C.010 et seq., applies to any development proposal.

After receiving Ms. Alvarez's letter, Ecology director Hallauer wrote to Governor Ray informing her that the Department of Interior had refused their funding request. In this letter he stated:

> The sense of the federal position is that they see no point in paying for the property as it is frozen into non-development posture by the effect of CZM and the Washington State Shoreline Act.
>
> This attitude reflects a taking of unfair advantage by government. The owners have been deprived of property rights by government action -- in fairness, there should be an attempt to compromise on the "taking" issue.

As Orion investigated means of developing its Padilla Bay property, local and state agencies continued to look into methods of protecting the bay in its natural state. The result of those efforts is the final and determinative land use program that directly impacts Orion's property: the creation of

the Padilla Bay Estuarine Sanctuary. Creation of this sanctuary is direct evidence of the State's conclusion and plan that the estuary of Padilla Bay remain undeveloped.

During 1978, Ecology began a project to create the Padilla Bay Estuarine Sanctuary. Under the federal Coastal Zone Management Act of 1972, the Secretary of Commerce may make grants to states for the purposes of acquiring, developing, or operating estuarine sanctuaries. Such grants are not to exceed 50 percent of the total cost involved. 16 U.S.C. § 1461. Pursuant to this section, Ecology put together a grant proposal for creating the Padilla Bay Estuarine Sanctuary. The program called for public ownership of Padilla Bay.

The Padilla Bay Estuarine Sanctuary steering committee was formed to guide the creation of the sanctuary and was

composed of officials from local and state agencies. The steering committee looked at several sites as possible sanctuaries before selecting Padilla Bay. The ownership pattern of the bay made it easier to acquire than any other areas where ownership was "incredibly fragmented." When the sanctuary was in the planning stages, Ecology's assistant director stated that acquisition of the Orion holding would be the first order of business.

Ecology officials who met with Robert Schofield, Skagit County planning director, found him to be an early supporter of the sanctuary. Mr. Schofield agreed to support the project before the county commissioners and stated that the commissioners would favor the sanctuary. Schofield "discussed the alternative use of Padilla Bay--(Orion Development Corporation) and indicated that the retention of the area in its

natural state would be preferable to the commercial development planned by Orion[.]" Mr. Bud Norris, present Skagit County commissioner, testified in his deposition that he endorsed the bay's designation as a sanctuary and the designation denoted its need for protection.

During the planning stages, Ecology proposed that the sanctuary be appropriated by utilizing the "willing seller" concept. Ecology's appraisal concluded that Orion's property had a value of $80 per acre as marginal oyster land. Orion had previously rejected offers of $90 per acre and $110 per acre. Noting that the value of the land appeared to be decreasing, Orion also rejected this offer. (An independent appraisal of the land, performed at Orion's request, valued it as $1,200 per acre as diked farmland.)

On April 4, 1980, the Legislature passed Engrossed Senate Bill 3371, appro-

priating matching funds, as required under 16 U.S.C. § 1461, to purchase tidelands for the establishment of the Padilla Bay Estuarine Sanctuary. Laws of 1980, ch. 180, § 1, p. 610. The act did not designate any specific property as constituting the sanctuary but did specifically authorize regulated hunting, fishing, boating, and noncommercial taking of shellfish on the sanctuary.

In July of 1980, the final environmental impact statement (hereinafter EIS) for the proposed estuarine sanctuary grant was filed with the Department of Commerce. This EIS identified the proposed sanctuary as comprising approximately 11,000 acres of Padilla Bay. All of Orion's property holdings were included within the proposed sanctuary boundaries.

The National Oceanic and Atmospheric Administration, which oversees the federal Coastal Zone Management Act of 1972,

issued regulations for the administration of estuarine sanctuaries. The purpose of the program is to create natural field laboratories in which to gather data and make studies of the natural and human processes occurring within the estuaries of the coastal zone. The primary use of estuarine sanctuaries shall be for research and educational purposes. 15 C.F.R. § 921.3 (1984). While multiple uses are possible in estuarine sanctuaries, such compatible uses are generally low intensity recreation, fishing, hunting and wildlife observation. 15 C.F.R. § 921.5(A) (1984). Moreover,

> (b) There shall be no effort to balance or optimize uses of an estuarine sanctuary on economic or other bases. All additional uses of the sanctuary are clearly secondary to the primary purpose and uses, which are long-term maintenance of the ecosystem for scientific and educational uses. Non-compatible uses, including those uses which would cause significant short or long-term ecological change or would otherwise detract from or restrict

> the use of the sanctuary as a natural field laboratory, will be prohibited.

(Italics ours.) 15 C.F.R. § 921.5(b) (1984). Lastly, management of estuarine sanctuaries is the responsibility of the State or its agent. Any management program, however, must be in conformance with the federal regulations and guidelines. 15 C.F.R. § 921.30 (1984). Thus, the state management program must ensure "long-term maintenance of the ecosystem for scientific and educational uses."

The Padilla Bay Estuarine Sanctuary officially came into being August 29, 1980. The federal government granted $1.2 million to the State for property acquisition and construction of an interpretative center on the 11,600-acre site. Wash. Dep't of Ecology, Shoreline/Coastal Zone Management (Sept. 1980). The interpretative center was dedicated in September of 1982. State maps at the center depict the 11,600-acre sanctuary as including

all 9,600 acres controlled by Orion. These maps included Orion's property holdings within the proposed sanctuary despite the fact Orion has not been a "willing seller".

Despite the state development and advertisement of the sanctuary, Orion continued to negotiate with the State over selling its land but the parties were unable to agree on a price. Finally, Orion instituted the present suit.

Orion alleged principally that the county and state activity amounted to an unconstitutional taking by inverse condemnation. Under three alternative theories (1) a de facto taking, (2) a taking-oppressive precondemnation activity, and (3) a taking by overregulation.

The State and County answered and moved for summary judgment, arguing that Orion's complaint should be dismissed for failure to first exhaust administrative

remedies. The State also argued that Orion lacked standing.

In opposition, Orion contended that it had no administrative remedies against the defendants' sanctuary activities. Orion also argued that it need not exhaust futile and inadequate administrative remedies. It alleged that the numerous regulatory schemes and the attitudes of various agencies involved made it clear that Orion will not be allowed to develop its property and, therefore, the available administrative remedies were inadequate and futile.

II

The State first argues that Orion does not have standing to maintain this action. As to Orion's de facto taking argument, the State contends that its sanctuary activity is merely an attempt to buy land and not an invasion of Orion's land. Similarly, the State argues that

Orion lacks standing to claim oppressive precondemnation activity because no plan or attempt to condemn has been announced or pursued. The State concludes that since Orion lacks standing to raise these claims, the entire suit rests on Orion's overregulation claim, to which Orion must first exhaust administrative remedies.

We do not agree. To have standing, one must have some protectable interest that has been invaded or is about to be invaded. Vovos v. Grant, 87 Wn.2d 697, 555 P.2d 1343 (1976); State ex rel. Hays v. Wilson, 17 Wn.2d 670, 137 P.2d 105 (1943). Orion alleged that the State's sanctuary activities have interfered with its property rights. Cf. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 n.6, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1979) (within meaning of taking clause, property includes the entire group of rights inherent in ownership). Orion,

which owns the land that has been allegedly taken without just compensation, has standing to raise those claims. The State's arguments go to the merits of Orion's claims. The trial court did not address the merits of Orion's claims and those issues are not before us.

III

Although the trial court found that Orion had no administrative remedies available to contest the petitioners' sanctuary development, the petitioners argue that such remedies are available under the SCSMMP. Petitioners' position is that the SCSMMP is the only regulatory scheme directly applicable to Orion's property because Orion has refused to sell its land to the State. Therefore, the property is not within the estuarine sanctuary and not subject to the sanctuary regulation. Petitioners conclude that if the SCSMMP can eliminate the effects of

the sanctuary development, then Orion has administrative remedies available to it.

Petitioners assert that the SCSMMP provides a legally adequate remedy which Orion must pursue and has admittedly failed to pursue. Orion has sought neither a variance nor a conditional use permit although both are potentially available. Petitioners argue that because either a variance or conditional use permit could alleviate any harmful consequences of the program, failure to pursue these administrative remedies bars Orion from maintaining this suit. Ackerley Communications, Inc. v Seattle, 92 Wn.2d 905, 911, 602 P.2d 1177 (1979), cert. denied, 449 U.S. 804 (1980); accord, Lange v. Woodway, 79 Wn.2d 45, 48, 483 P.2d 116 (1971).

It is a general rule that when an adequate administrative remedy is provided, it must be pursued before the courts will intervene. Wright v. Woodard, 83 Wn.2d

378, 381, 518 P.2d 718 (1974). If the administrative mechanisms available can alleviate the harmful consequences of the governmental activity at issue, a litigant must first pursue those remedies before resort to the court. Lange v. Woodway, supra (variance available but not sought); accord, Ackerley Communications, Inc. v. Seattle, supra (variance available but not sought). This is particularly true in land use cases where the matter in question involves an act of legislative discretion. Lange, at 48.

As the cases make clear there is a strong bias towards requiring exhaustion before resort to the courts. This court recently noted that the policies underlying the exhaustion doctrine are to (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision,

(3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts. South Hollywood Hills Citizens Ass'n v. King Cy., 101 Wn.2d 68, 73, 74, 677 P.2d 114 (1984).

Although these policies strongly favor exhaustion, this court has recognized that the doctrine is not absolute.

> Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality. For example, if resort to the administrative procedures would be futile, exhaustion is not required. Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975).

South Hollywood Hills Citizens Ass'n, at 74.

We believe that in this case, considerations of fairness and practicality outweigh the policies underlying the

doctrine. We are convinced that on this record, resort to the administrative procedures would be futile and vain. Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975).

If we were to look solely at the Skagit County Shoreline Management Master Program, as the petitioners argue, we might be forced to agree with their position. However, the petitioners ask us to ignore the record in this case. The record reveals that the State has made a conscious policy choice to preserve Padilla Bay in its natural state. Moreover, the record reveals much more than a policy choice; the record shows that choice coming to fruition by the creation of the Padilla Bay Estuarine Sanctuary.

Without Orion's property, there can be no estuarine sanctuary. The record makes it abundantly clear that to require Orion to seek a development permit would

"require them to pump oil from a dry hole." Ogo Assocs. v. Torrance, 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761 (1974). See also Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964).

A willingness to consider an application is irrelevant if there is no hope of success if one is submitted. Prior decisions have required exhaustion after finding that no showing as to futility or inadequacy was made. See, e.g., Wright v. Woodard, supra at 382 (no showing or facts advanced showing unfairness or impartiality); Ackerley Communications, Inc., supra at 911 (no showing remedy is unavailable or inadequate); Lechelt v. Seattle, 32 Wn. App. 831, 836, 650 P.2d 240 (1982) (no showing bringing administrative action useless). That is not the case here.

The futility exception to the exhaustion doctrine is premised upon the rationale that courts will not require vain and useless acts.

> Clearly, the administrative remedies which must be exhausted are only those which promise adequate and timely relief. If the available administrative remedies are inadequate, or if they are vain and useless, they need not be pursued before judicial relief is sought.

(Footnotes omitted.) 4 R. Anderson, Zoning § 26.10 (2d ed. 1977). Thus, futility goes beyond legal adequacy and addresses factual adequacy. However, contrary to the petitioners' argument, futility addresses more than a direct showing of bias or prejudice on the part of discretionary decision makers. While rare, futility can be demonstrated by the factual circumstances of a particular case. Such a unique set of facts is found in this case.

Orion argues that there is no present, possible and reasonably profitable alter-

native use to which its property is adaptable. See Carlson v. Bellevue, 73 Wn.2d 41, 435 P.2d 957 (1968). A substantial development permit will not be issued unless consistent with the applicable master program and the SMA. RCW 90.58.140(2)(b). Under the Skagit County Shoreline Management Master Program and Ecology's regulations under the SMA, only two uses are potentially conceivable on Orion's property, aquaculture and recreational use.

Recreation must be limited to nonintensive, nonextractive and nonstructural activities. SCSMMP ch. 7.12(2)(b)(4). Sanctuary regulations, while not directly applicable to Orion's property as of yet, permit only nonintensive recreational uses on Padilla Bay. See 15 C.F.R. § 921.5 (1984). Such uses would provide Orion no economic return.

Aquaculture would require the issuance of a conditional use permit. A variance or conditional use permit may be lawfully granted only within the guidelines set forth in the zoning ordinance. Lewis v. Medina, 87 Wn.2d 19, 22, 548 P.2d 1093 (1976). To obtain a conditional use permit an applicant must meet all the following criteria:

a. That the proposed use will be consistent with the policies of this Master Program and policies of RCW 90.58.020.

b. That the proposed use will not interfere with the normal public use of public shoreline.

c. That the proposed use of the site and design of the project will be compatible with other permitted uses in the area.

d. That the proposed use will cause no unreasonable adverse effects to the shoreline environment designation in which it is located.

e. That the public interest suffers no detrimental effect.

(Italics ours.) SCSMMP ch. 11.03.

Variance criteria are even stricter. See SCSMMP ch. 10.03(2).

Orion's land has been designated a shoreline of statewide significance, RCW 90.58.030(2)(e)(ii)(E); recognized as an area of statewide concern under the Washington State Coastal Zone Management Program; and included in an estuarine sanctuary that is dedicated to long-term maintenance of the ecosystem. Moreover, the public interest under the SMA is that unique and fragile natural resource areas are to be left undeveloped. WAC 173-16-040(5)(d)(i). Any conditional use permit must be compatible with these designations and ensure that the public interest suffer no detrimental effect.

There is no doubt that Padilla Bay is a unique and fragile natural resource area. Moreover, any use must be compatible with permitted activities in the area and not cause adverse effects to adjacent

properties. The permitted use in the area and the adjacent property is the Padilla Bay Estuarine Sanctuary. Thus, no aquaculture permit would be issued if incompatible with sanctuary activities: research and recreation.

Moreover, the State's own appraisal states that Orion's property's highest and best use would be marginal oyster land. However, the appraisal suggests that only 200 to 300 acres of Orion's tract would be suitable for oystering. The appraisal also states that Padilla Bay is expected to be farmed best with bottom culture and hydraulic harvesting. Yet hydraulic harvesting is not permitted in areas with significant quantities of eelgrass. "Harvesting in Eelgrass Clarified," Wash. Dep't of Ecology, Shoreline/Coastal Zone Management vol. 5, No. 3 (Sept. 1980). Padilla Bay contains the largest and least disturbed stand of eelgrass left on

the West Coast of the United States. Moreover, removal or dredging of bottom materials for shellfish harvest is prohibited on shorelines of statewide significance under the SCSMMP. See SCSMMP ch. 7.02(2)(A)(6)(3), (B)(11).

We are aware of the admonition contained in King v. Seattle, 84 Wn.2d 239, 252-53, 525 P.2d 228 (1974) which is appropriately restated here.

> We are mindful, nonetheless, of the potential for abuse which legal process may serve in the hands of public officials, bankrolled with public funds, who seek to achieve by delay and the necessity for costly court suits or administrative hearings what they cannot achieve on the merits--the frustration of private citizens' legally protected activity.

King, at 252-53.

Reviewing this record it becomes quite evident that the State and County have made a policy choice to prevent development of Padilla Bay. The creation of the Padilla Bay Estuarine Sanctuary makes this evident. Even assuming that

the sanctuary regulations may not be binding upon the County, the County cannot successfully argue that the sanctuary designation would not have a direct bearing on their decisionmaking, rendering any permit application a vain and useless act. We so hold.

IV

As a final matter, in support of its motion, Orion filed the affidavit of Mr. Peter L. Buck. Mr. Buck, an attorney testifying as an expert witness, reviewed all exhibits filed in the case and all regulations applicable to Orion's property. His affidavit stated that Orion would never be granted a substantial development permit; and if one was granted it would be appealed and overruled by the Shorelines Hearings Board. He also concluded that under the SCSMMP and Ecology's regulations no variance or conditional use permits were available to Orion. He also stated

that to pursue the administrative remedies would take at least 2 years and cost over $200,000. The defendants objected to the Buck affidavit and moved to strike it as speculative, argumentative and a legal opinion.

The trial court, after reviewing the affidavit, denied the motion to strike Buck's affidavit. The court, in its discretion, admitted the Buck affidavit, noting any objection to it went to its weight rather than admissibility.

The affidavit of Mr. Buck was made on personal knowledge and contained a proper foundation outlining his expertise to testify as an expert witness. Additionally, all exhibits he refers to within his affidavit, were part of the record before the trial court. Thus, there was compliance with CR 56(e); see also Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 431 P.2d 216 (1967). The petitioners

argue, however, that the affidavit was based upon speculation and legal opinion and, therefore, should not have been considered by the trial court. American Linen Supply Co. v. Nursing Home Bldg. Corp., 15 Wn. App. 757, 551 P.2d 1038 (1976). Experts are not to state opinions of law. Comment, ER 704.

Orion argues that Mr. Buck testified as an expert witness. He testified to a factual matter, whether any permit application would be a futile gesture. He also detailed the interplay of the various regulations in the record. Such opinion testimony is admissible if it will assist the trier of fact to understand the evidence or determine a fact in issue. ER 702. Such testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact. ER 704. Moreover, Mr. Buck testified as to the costs and time of pursuing the adminis-

trative process. To the extent the affidavit contained legal conclusions it is to be disregarded but the rest of the affidavit can properly be considered. American Linen Supply Co. v. Nursing Home Bldg. Corp., supra.

This is a very close call. Qualifications of expert witnesses are to be determined by the trial court within its sound discretion and rulings on such matters will not be disturbed except for a manifest abuse of discretion. State v. O'Connell, 83 Wn.2d 797, 816, 523 P.2d 872 (1974). See also Ball v. Smith, 87 Wn.2d 717, 725, 556 P.2d 936 (1976). There is no abuse of discretion shown in this case. The trial court admitted Mr. Buck's affidavit, noting that the objections went to the weight rather than the admissibility. While the conclusions of law contained in the affidavit are improper, the court must be presumed to

have ignored these conclusions. There were factual conclusions in the exhibit which the court could consider. Moreover, courts indulge in some leniency with respect to affidavits presented by the non-moving party. Meadows v. Grant's Auto Brokers, Inc., supra at 879.

The trial court is affirmed and the case is remanded for a trial on the merits.

APPENDIX

1. Agriculture (ch. 7.01): Prohibited. 7.01(2)(A)(6), at 7-4.

2. Aquaculture (ch. 7.02): At shorelines of statewide significance: Removal of bottom material for shellfish harvest is prohibited; all other aquaculture operations and developments require a conditional use permit. 7.02(2)(B)(11), at 7-11. Estuaries should be protected to sustain and foster their natural productivity. 7.02(C), at 7-7.

3. Commercial Development (ch. 7.03): Prohibited except for commercial docking and boat filling stations, 7.03(2)(A)(6), (B)(1), at 7-16, and it should be located away from estuaries and tidelands. 7.03(1)(C)(3), at 7-13.

4. Dredging (ch. 7.04): Should not occur in estuaries, natural wetlands, and marshes. 7.04(1)(B)(1)(a), at 7-20.

5. Forest Management Practices (ch. 7.05): Prohibited (with exceptions not relevant here). 7.05(2)(A)(6), at 7-30.

6. Landfills (ch. 7.06): Prohibited except as a conditional use for water and shoreline dependent development consistent with the master program, 7.06(2)(6), at 7-35, but they should not be located in estuaries, natural wetlands, and marshes. 7.06(1)(B)(1)(b), at 7-33.

7. Marinas and Launch Ramps (ch. 7.07): Should not be located where

shellfish and aquacultural resources are adversely affected or where shellfish and wildlife habitats and migratory routes would be adversely affected. 7.07(1)(B)-(3)(c), (d), at 7-38. They also should not be located in estuaries, natural wetlands, tidelands, and fish and shellfish spawning and rearing areas. 7.07(1)(C)(1), at 7-39. In any event, no building is allowed over water, except for specified percentages of covered moorage structures. 7.07(2)(A)(6)(b), at 7-43.

8. Mining (ch. 7.08): Prohibited. 7.08(2)(A)(6), at 7-51.

9. Outdoor Advertising and Signs (ch. 7.09): Prohibited except for one flush wall-mounted sign. 7.09(2)(A)(6), at 7-59.

10. Piers and Docks (ch. 7.10): Should not locate in estuaries and biologically productive marshlands. 7.10(1)(B)(1)(c), at 7-64.

11. Ports and Industry (ch. 7.11): Should not be located in areas of high environmental value. 7.11(1)(B)(4), at 7-72.

12. Recreation (ch. 7.12): Unique and fragile areas, including estuaries, should be preserved for less intensive forms of recreation. 7.12(1)(C), at 7-80. Estuaries shall be utilized only for nonintensive, nonstructural, and nonextractive recreation activities. 7.12(2)(B)(4), at 7-84. In addition, recreational development should be compatible with adjacent and surrounding land and water uses. 7.12(1)(E)(1), at 7-81. And even in less special aquatic areas, motorized vehicles, except for launching and emergency purposes, are prohibited, 7.12(2)(B)(5)(c), at 7-84, and auxiliary use facilities must be located inland. 7.12(1)(D)(2), at 7-81.

13. Residential Development (ch. 7.13): Prohibited. 7.13(2)(A)(6), at 7-94.

14. Scientific and Educational Resources (ch. 7.14): Use of the property may not conflict with or adversely affect the purpose, character, or value of the resources and adjacent scientific educational sites. 7.14(2)(B)(4), at 7-102.

15 and 16. Shore Defense Works (ch. 7.15) and Shoreline Stabilization and Flood Protection (ch. 7.16): Not relevant.

17. Transportation Facilities (ch. 7.17): Should not adversely affect estuaries, natural wetlands, marshes, natural resources, fish, shellfish, and wildlife and migratory routes. 7.17(1)(A)(6), at 7-118.

18. Utilities (ch. 7.18): Should not adversely affect natural resources, fish, shellfish, and wildlife and migratory

routes, 7.18(1)(A)(5), at 7-126, and should be located to avoid natural wetlands, estuaries, and tidelands. 7.18(1)(B)(4), at 7-127.

19. Variances (ch. 10): Limited to relief from specific bulk, dimensional or performance standards. Master Plan 10.01 (as amended). An additional criterion for granting a variance is that "the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment designation." 10.03, at 10-1.

WILLIAMS, C.J., DIMMICK and PEARSON, JJ., and CUNNINGHAM, J. Pro Tem., concur.

UTTER, J. (concurring)--I concur in the result reached by the majority. It would be futile for The Orion Corporation to be required to apply for a permit for development it does not wish to pursue and that they certainly would not get.

The majority opinion suggests that a taking may have occurred simply because Orion can find no present, possible and reasonably profitable use for its tideland property. At least one commentator discussing whether shoreline regulation may result in an uncompensated taking notes that property rights in privately owned tidelands may not be identical to those in privately owned uplands. Crooks, The Washington Shoreline Management Act of 1971, 49 Wash. L. Rev. 423, 456 (1974). Even prior to enactment of the Shoreline Management Act of 1971, the extent to which Orion would have been able to develop its tideland property is unclear. Article 17 of the Washington Constitution vests ownership of tidelands in the State. However, disposal of tidelands by the State is subject to the public interest in navigation and the fishery. Hill v. Newell, 86 Wash. 227, 231, 149 P. 951

(1915), quoting People v. California Fish Co., 166 Cal. 576, 138 P. 79, 82-83 (1913); see generally Johnson & Cooney, Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters, 54 Wash. L. Rev. 275, 285-87 (1979); Corker, Thou Shalt Not Fill Public Waters Without Public Permission--Washington's Lake Chelan Decision, 45 Wash. L. Rev. 65, 73-76 (1970).

We also need not rule on the admission of a portion of the affidavit by attorney Peter Buck. As the majority concedes, experts are not to state opinions of law. Comment, ER 704. It may not be correct that Mr. Buck's opinion that any permit application would be a futile gesture is a factual matter. Such an opinion would seem to be a legal opinion and, along with other legal opinions in the affidavit, should be disregarded by the trial judge. This is not critical to the case, however,

because the other evidence overwhelmingly establishes Orion's contentions.

DORE, J. (dissenting)--While I concur with the majority on the standing issue, I dissent from the remainder of the opinion. The majority has effectively repealed the Shoreline Management Act of 1971, RCW 90.58, by eliminating the requirement that a shoreline land developer must first exhaust administrative remedies before seeking redress through the courts. I also believe it was prejudicial error to admit the Buck affidavit because it constituted a legal opinion rather than a factual presentation.

EXHAUSTION OF REMEDIES

The rule is that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene. Wright v. Woodard, 83 Wn.2d 378, 381, 518 P.2d 718 (1974). This rule is based upon the belief that the courts

should give proper deference to that body possessing expertise in areas outside the conventional experiences of judges. Retail Store Employees Local 1001 v. Washington Surveying & Rating Bur., 87 Wn.2d 887, 906, 558 P.2d 215 (1976). This is especially true when the relevant issues involve technical matters peculiarly within the competence and special skills of an administrative authority. Sunny Brook Farms v. Omdahl, 42 Wn.2d 788, 793, 259 P.2d 383 (1953). Land use decisions fall within this category especially when we consider the mandate from the Legislature in the form of the Shoreline Management Act of 1971 (SMA), RCW 90.58.010 et seq.

LEGISLATIVE BACKGROUND

The SMA was a response to the finding of the Legislature that the "shorelines of the state are among the most valuable and fragile of its natural resources and

that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation." RCW 90.58.020. The Legislature concluded that it is "the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020. To implement this policy, the Legislature provided that initial decisions regarding shoreline development would be made by local government. RCW 90.58.140(2). In this instance, the local administrative authority is the Skagit County Planning Commission. Skagit County Shoreline Management Master Program (SCSMMP) ch. 8.03. The Skagit County Board of County Commissioners has the authority to grant or deny permits after considering the recommendations of the Commission. SCSMMP ch. 8.04(1)(a). If variances or conditional use permits are

involved, the Department of Ecology has review authority. RCW 90.58.140(12). Finally, permit decisions are always appealable to the Shorelines Hearings Board, RCW 90.58.180--an expert body due deference on the subject of appropriate shoreline land use. Department of Ecology v. Ballard Elks Lodge 827, 84 Wn.2d 551, 556, 527 P.2d 1121 (1974). This is the structure created by our Legislature for evaluating a proposed development of a state shoreline.

PADILLA BAY

It is against this legislative mandate that we must evaluate The Orion Corporation's decision to forgo formal governmental review of any development proposal. Padilla Bay is a tideland with significant ecological value. It has been recognized as a shoreline of statewide significance by our Legislature. See RCW 90.58.030(2)-(e)(ii)(E). The Orion Corporation (Orion)

began purchasing property in Padilla Bay in the 1960's. Over the years it claims it has considered several plans to develop its property. Its original intent was to build a Venetian-style resort community. It also considered diking and draining the property and using it as farmland. It explored the possibility of various forms of aquaculture such as oyster and clam harvesting. It even considered the possibility of a duck hunting club. Yet, none of these proposals was ever submitted to Skagit County for review. In all the years Orion has owned the Padilla Bay property, it has never once filed for a substantial development permit.

Nevertheless, Orion now asserts that overregulation of its property has resulted in a taking. The issue before us is not the impact of the SMA and other legislation on the value of Orion property, but whether adequate administrative remedies are

available for Orion to pursue. In other words, are the remedies within the SMA and SCSMMP capable of alleviating the claimed harm caused by the regulatory programs?

While I recognize Orion property is highly regulated, an adequate administrative remedy is available. As a preliminary matter, it must be stressed that Orion property is not part of the Padilla Bay Estuarine Sanctuary; therefore, the Sanctuary regulations do not directly apply to it. All parties agree that the primary regulatory authority is the Skagit County Shoreline Management Master Program. As the majority states, the SCSMMP, through the mechanism of a conditional use permit, is authorized to allow aquaculture. SCSMMP ch. 7.02(2)(A)(6)(3), (B)(11). The criteria are strict but they are not impossible for Orion to meet. For example, I do not interpret SCSMMP ch. 11.03(c) to

mean that all of Orion property must be left undeveloped in order to be compatible with sanctuary activities. The degree to which the sanctuary impacts on Orion land is not certain. A conditional use could be allowed if it was sufficiently removed from sanctuary property. In addition, it is important to note that one of the policies of the SMA is to recognize and protect private property rights consistent with the public use. RCW 90.58.020.

Orion asserts that aquaculture is not an economic use of its land, but that issue is not before us. An adequate administrative remedy is one capable of alleviating the harm. Ackerley Communications, Inc. v. Seattle, 92 Wn.2d 905, 602 P.2d 1177 (1979), cert. denied, 449 U.S. 804 (1980). A remedy is available which would allow Orion to use its property. Unless Orion can demonstrate the basis for an exception, it should be

required to exhaust its administrative remedies.

Washington recognizes that in certain limited situations administrative remedies need not be pursued. South Hollywood Hills Citizens Ass'n v. King Cy., 101 Wn.2d 68, 677 P.2d 114 (1984). Orion raises a claim of futility. While the record indicates the State is interested in preserving Padilla Bay, the fact remains that the regulations which directly impact on Padilla Bay allow for a conditional use. The criteria for determining whether a conditional use shall be permitted are general and allow for some degree of discretion by the decision makers. In addition, any aggrieved party has the right to appeal a decision to the Shorelines Hearings Board. RCW 90.58.180.

Admittedly Orion land is highly regulated; however, I do not agree that the regulations mean that Orion is abso-

lutely foreclosed from using its land. Therefore, the parameters of what Orion can and cannot do with its property should be made by the administrative body possessing the expertise to make the decision. The effect of the majority's holding is to allow a developer to choose to bypass the administrative process. As long as the developer is able to demonstrate his land is highly regulated, he need not ever submit a concrete proposal to formal governmental review before claiming a taking. By refusing to require the exhaustion of administrative remedies, the majority has effectively nullified the procedural requirements of the SMA.

In addition, I do not believe that Orion should be exempt because it has tacked a 42 U.S.C. § 1983 claim onto its complaint. Orion raises a claim under 42 U.S.C. § 1983 and argues that even if there are administrative remedies

available, it is exempt from exhausting them. Patsy v. Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). Patsy held that a 42 U.S.C. § 1983 claimant is not required to exhaust its administrative remedies before bringing an action; however, the holding is limited to actions brought in federal courts.

BUCK AFFIDAVIT

Peter Buck is an attorney primarily engaged in land use work. Orion submitted his affidavit as support for its position. The affidavit is a highly persuasive piece of evidence; in fact, it is the only evidence which merges the facts and harmonizes the interplay of the regulations and draws a legal conclusion. Buck says:

> 4. Based on my years of experience in regard to coastal zone regulations and my review of the regulations and other documents set forth above, I conclude as follows:
>
> 4.1 Orion will never be granted a substantial development permit to develop its Padilla Bay property for any economically productive use

under the Shoreline Management Act as enacted and under Skagit County's Master Program as enacted and since amended by that County.

4.2 A substantial development permit cannot lawfully be granted Orion for economically productive use of its Property. In the extraordinary case that Skagit County disregarded its own Master Program and issued Orion a substantial development permit, such a permit would to a certainty be appealed by the State or by a concerned environmental group, and the Shoreline Hearings Board and courts would have no choice but to overrule such a permit as in violation of the Master Program, the Shoreline Management Act, and regulations under it.

Clerk's Papers, at 212-13. Buck continues:

9. Having concluded that Orion would never be issued a substantial development permit under the use regulations of Skagit County's Master Program, I looked to the Program's provisions for variances set forth in ch. 10. Orion would not be granted a variance. . . .

10. The Master Program provides for conditional uses in chapter 11. Orion would not be granted a conditional use permit.

Clerk's Papers, at 216. In effect, Buck has engaged in the same type of analysis as a trial judge. The rule is that experts

are not authorized to render opinions of law or mixed opinions of fact and law. Comment, ER 704.

Yet, the trial judge admitted the affidavit, stating the objection went to its weight and not admissibility. This was prejudicial error. We cannot say that this error did not affect or presumptively affect the outcome of the motion, Brown v. Spokane Cy. Fire Protec. Dist. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

CONCLUSION

Orion has administrative remedies available to request the development of its property. The majority here, by its decision in ruling Orion need not exhaust its administrative remedies, establishes a dangerous precedent which, in effect, emasculates the Shoreline Management Act of 1971, RCW 90.58, by eliminating the requirement that a shoreline land developer must first exhaust administrative remedies

before seeking redress through the courts. The majority here ignores the carefully drafted procedural safeguards that the Legislature has provided to protect our shorelines, and legislates to effectuate an unjustified exemption.

I would also hold that it was prejudicial error to admit the Buck affidavit upon which the trial judge based much of his reasoning in sweeping aside the doctrine that administrative procedure should be exhausted before seeking relief in court.

APPENDIX C

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation,	)	NO. 82-2-00391-6
Plaintiffs,	)	ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR TO DISMISS COMPLAINT FOR FAILURE TO HAVE EXHAUSTED ADMINISTRATIVE REMEDIES, OR FOR LACK OF STANDING; GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION TO STRIKE SAID DEFENSES; AND DENYING STATE OF WASHINGTON'S MOTION TO STRIKE THE AFFIDAVIT OF PETER L. BUCK
vs.	)	
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	

THIS MATTER having come before the Court upon Skagit County's and the State of Washington's motions for summary judgment or to dismiss plaintiff's Complaint for failure to have exhausted

administrative remedies or for lack of standing; upon plaintiff's motion for summary judgment to strike those defenses; and upon the State of Washington's motion to strike the Affidavit of Peter L. Buck;

The Court having considered the oral and written argument of counsel, having reviewed the file, pleadings, and evidence herein, including the Affidavits of John B. Skilling, sworn to January 3, 1983 and March 28, 1983; the Affidavit of Clinton W. Morrow, sworn to December 29, 1982; the Affidavits of Mark S. Clark, sworn to December 27, 1982 and January 6, 1983; and the exhibits to all of said affidavits; the Affidavit of Peter L. Buck, sworn to March 25, 1983; the Affidavits of Robert C. Schofield, sworn to October 18, 1982 and January 5, 1983, Bud Norris, sworn to October 19, 1982 and January 10, 1983, Terrance Stevens, sworn to October 19, 1982; the deposition transcripts of Rodney

Mack, taken March 3, 1983, and Robert C. Schofield, Bud Norris, Terrance C. Stevens, Jerry Mansfield, and David C. Rohrer, all taken March 2, 1983, and the Requests for Admissions and Admissions herein;

The Court, in its discretion, having admitted into evidence the Affidavit of Peter L. Buck, any objections to portions of said affidavit going to its weight rather than admissibility; and

The Court having concluded as a matter of law:

1. As to defendants' alleged de facto taking of plaintiff's property and taking of it by physical invasion, that plaintiff does not have available to it any administrative remedy or recourse to exhaust; and, if any administrative remedy or recourse were available, pursuing it would be futile and impractical, given that any application by plaintiff for relief would, in the circumstances of

this case as established by the record, involve only hypothetical and abstract applications for permits or other relief that the appropriate governmental agencies or departments would summarily deny or dismiss;

2. As to plaintiff's claim that defendants have taken its property by excessive regulation, that any administrative procedures, including those under Skagit County's Shoreline Management Master Program, are wholly and patently inadequate because they do not have the potential for alleviating any harm to plaintiff; futile because the appropriate governmental bodies would not grant any use or development permits or other relief to plaintiff under those statutes and regulations; and impractical because plaintiff's applications for permits or other administrative relief would be excessively costly, burdensome,

time-consuming and without any possibility of success; and

3. As to the futility and impracticality referred to in conclusions nos. 1 and 2, that plaintiff has proven conclusively by uncontroverted facts that pursuing any available administrative procedures would be futile and impractical; even considering all evidence most favorably to defendants, defendants have failed to set forth any specific facts raising any genuine issue of material fact for trial on these issues; and, there being no genuine issue of fact regarding the futility and impracticality of any adminsitrative recourse, plaintiff is entitled, as a matter of law, to summary judgment on these issues; and

There being no just reason for delaying the entry of final judgment on the issues before the Court;

Now, therefore,

IT IS HEREBY ORDERED:

1. That the State of Washington's and Skagit County's motions for summary judgment or to dismiss the Complaint, based on their defenses that plaintiff lacks standing or failed to exhaust administrative remedies, are denied;

2. That plaintiff's motion for summary judgment striking defendants' defenses based on lack of standing or failure to have exhausted administrative remedies is granted, and these defenses are hereby stricken;

3. That the State of Washington's motion to strike the Affidavit of Peter L. Buck is denied; and

4. There being no just reason for delay on the above motions and the issues upon which they are based, that final judgment is hereby granted as to these motions and issues.

DATED this 31st day of May, 1983.

/s/ Walter J. Deierlein, Jr.
JUDGE WALTER J. DEIERLEIN, JR.

Presented by:

Hillis, Phillips, Cairncross,
Clark & Martin, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ James J. Ragen
James J. Ragen
Attorneys for Plaintiff

Approved as to form;
Notice of presentation waived;

_____
Wick Dufford
Attorney for State of Washington Defendants

_____
John Moffat
Attorney for Skagit County Defendants

Keller, Rohrback, Waldo, Hiscock,
Butterworth & Fardal

By_____
William C. Smart
Attorneys for Skagit County Defendants

IT IS HEREBY ORDERED:

1. That the State of Washington's and Skagit County's motions for summary judgment or to dismiss the Complaint, based on their defenses that plaintiff lacks standing or failed to exhaust administrative remedies, are denied;

2. That plaintiff's motion for summary judgment striking defendants' defenses based on lack of standing or failure to have exhausted administrative remedies is granted, and these defenses are hereby stricken;

3. That the State of Washington's motion to strike the Affidavit of Peter L. Buck is denied; and

4. There being no just reason for delay on the above motions and the issues upon which they are based, that final judgment is hereby granted as to these motions and issues.

DATED this 31st day of May, 1983.

/s/ Walter J. Deierlein, Jr.
JUDGE WALTER J. DEIERLEIN, JR.

Presented by:

Hillis, Phillips, Cairncross,
Clark & Martin, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ James J. Ragen
James J. Ragen
Attorneys for Plaintiff

Approved as to form;
Notice of presentation waived;

_____
Wick Dufford
Attorney for State of Washington Defendants

_____
John Moffat
Attorney for Skagit County Defendants

Keller, Rohrback, Waldo, Hiscock,
Butterworth & Fardal

By_____
William C. Smart
Attorneys for Skagit County Defendants

APPENDIX D

IN THE SUPERIOR COURT OF
WASHINGTON FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation,	) NO. 82-2-00391-6
Plaintiff,	) ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM THAT THE DEFENDANTS HAVE TAKEN ITS PROPERTY BY EXCESSIVE REGULATION;
v.	) DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT REGARDING THIS SAME
STATE OF WASHINGTON, SKAGIT	) CLAIM; GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
Defendants.	) DISMISSING PLAINTIFF'S EQUAL PROTECTION AND CONTRACTUAL IMPAIRMENT CLAIMS

A. Motions.

This matter has come before the Court upon all parties' Motions for Summary Judgment relating to plaintiff Orion

Corporation's claim that the defendants Skagit County and the State of Washington have taken Orion's property by excessive regulation, specifically, Plaintiff's Motion For Summary Judgment on its Claim That Defendants Have Taken Its Property by Excessive Regulation, dated June 3, 1985; Skagit County's Motion For Summary Judgment Dismissing Cause of Action re: Excessive Regulation, dated May 29, 1985; State's Motion For Summary Judgment of Dismissal dated September 16, 1985. The State of Washington has also moved for Summary Judgment upon its contention that damages are not the proper remedy for such a claim, Motion For Summary of Dismissal Re: Remedy, dated June 6, 1985, and upon its contention that Orion's claims are barred by a statute of limitations, Motion for Summary Judgment Re: Statute of Limitations, dated June 6,

1985. All parties have briefed these issues.

In addition, the defendants have filed various motions on a damages issue in this case relating to the nature of Orion's property rights in its tideland property. Defendants contend that Orion's property rights were or are limited by a "public trust" doctrine or a "navigational servitude," and defendants have moved for an order declaring that Orion's property rights are limited thereby. By agreement, all parties have briefed this issue. The parties have also filed affidavits in regard to this issue and argued it extensively. The Court recognizes that the law increasingly favors environmental protections, although this represents a change both in social consciousness and in the law. The Court leaves undecided and for future resolution whether a "public trust" doctrine would date as of the time

that Orion acquired this property or as of the time that Orion's property was taken and, further, whether such a doctrine arose as a result of the Shoreline Management Act, RCW 90.58, or whether it was in place previously as a result of judicial decisions.

B. The Record.

The parties have created a substantial record in this case. The Court has considered the file, pleadings, and evidence on the issues now before the Court, including the Affidavits of James J. Ragen dated June 14 and 18, 1985; Affidavit of Clinton Morrow dated June 13, 1985; Affidavit of Leah Erlich dated June 13, 1985; Affidavit of William C. Smart dated August 12, 1985; Affidavit of Richard H. Baumgarner dated September 12, 1985; Affidavit of Robert Schofield dated September 12, 1985; Affidavit of Clifford Anderson dated September 13, 1985;

Affidavit of Terence C. Stevens dated September 13, 1985; Affidavit of Joseph R. Williams dated September 13, 1985; the Affidavit of Richard A. Burkhalter dated September 13, 1985; Affidavit of D. Rodney Mack dated September 13, 1985; Affidavit of Dr. Nancy Foster dated August 6, 1985; Affidavit of Dr. Allan Scholz dated September 10, 1985; Affidavit of Richard Burge dated August 6, 1985; Affidavit of Dr. Herbert H. Webber dated August 12, 1985; Affidavit of Russell F. Orrell dated August 2, 1985; Affidavit of Dr. Ronald M. Thom dated August 1, 1985; Affidavit of Kurt L. Fresh dated July 2, 1985; Affidavit of Dr. Robert J. Trumble dated August 2, 1985; Affidavit of Dr. David Armstrong dated August 1, 1985; Affidavit of Dr. Ronald C. Phillips dated August 1, 1985; Affidavit of Michael A. Davison dated July 29, 1985: Affidavit of Toby M. Michelena of July 29, 1985;

Affidavit of Charles A. Simenstad dated July 23, 1985, and all other affidavits on file on said date.

In addition, the Court has considered previous portions of the record including the affidavits and other evidence set forth in its Order dated May 31, 1983 relating to the exhaustion of administrative remedies issue, including the Affidavits of John B. Skilling, sworn to January 3, 1983 and March 28, 1983; the Affidavit of Clinton W. Morrow, sworn to December 29, 1982; the Affidavits of Mark S. Clark, sworn to December 27, 1982 and January 6, 1983; and the exhibits to all of said affidavits; the Affidavits of Robert C. Schofield, sworn to October 18, 1982 and January 5, 1983, Bud Norris, sworn to October 19, 1982 and January 10, 1983, Terrance Stevens, sworn to October 19, 1982; the deposition transcripts of Rodney Mack, taken March 3,

1983, and Robert C. Schofield, Bud Norris, Terrance C. Stevens, Jerry Mansfield, and David C. Rohrer, all taken March 2, 1983, and the Requests for Admissions and Admissions herein. The Court has also considered portions of other deposition transcripts submitted by counsel to the Court. The parties have extensively briefed these issues, and the Court has considered these memoranda as well as correspondence enclosing additional authorities. Finally, all parties have extensively addressed these issues in oral argument.

The Court concludes as a matter of law:

1. There are no genuine issues of material fact precluding the Court's ruling on the summary judgment motions before it. All parties have agreed, upon questioning by the Court, that it is now appropriate for the Court to rule upon

all parties' motions for summary judgment on Orion's excessive regulation claim. The Court has also independently concluded that there is no genuine issue of material fact precluding summary judgment on the excessive regulation claim, as well as on Orion's equal protection and contractual impairment claims. In this regard, the Court notes that there are many affidavits in the record; some of these affidavits appear in some regards to conflict. These conflicts, or apparent conflicts, are not impediments to summary judgment here, however; they raise no genuine issue of material fact as to the excessive regulation claim. The differences in the factual record relate primarily to areas that are not disputed between the parties. Generally, the Court concludes that Orion's claim that the defendants have taken its property by excessive regulation is in

all regards ripe and otherwise appropriate for a decision by summary judgment.

2. The defendants have taken Orion's property for public uses by excessive regulation without the payment of just compensation in violation of Article I, § 16 of the Constitution of the State of Washington and the 5th and 14th Amendments to the United States Constitution. Although the Court recognizes, and approves of, the increasing legal protection afforded the environment, the regulations affecting Orion's property, including the WAC regulations promulgated pursuant to the Shoreline Management Act and the Skagit County Master Program, have stripped Orion of all economic property rights it may have had in its property. No economic use remains to Orion. Any uses remaining to Orion under the Master Program are incidental only, including non-intensive recreational uses and educational uses.

These uses were not contemplated by anyone to be economic uses. Even after all argument of the defendants and on the extensive record before it, the Court cannot conceive how such non-intensive recreational uses could be economic in the context of this case. In regulating Orion's property, the defendants have simply gone too far; they have deprived Orion of its property rights and left it no economic use.

3. The State argued that Orion has an economic use in the form of a sale to the State at a fixed price determined by the State. The Court rejects the argument that the State can defeat a taking claim and escape its constitutional obligation to pay Just Compensation simply by making a unilateral offer to buy at a price it wishes to pay.

4. The regulations in questions were designed to promote a public benefit.

They seek to keep Orion's property in its natural state and to preserve it as a means of promoting a public good. The question before the Court, however, is whether the State's interest in maintaining and preserving Padilla Bay is a public improvement that ought, in justice and fairness, be borne by all of the public or borne privately by the property owners. This Court decides that this public benefit should be borne publicly; all of us have an interest in the preservation of Padilla Bay. This public benefit should not fall on an owner whose property has been so restricted that only the most incidental, non-economic uses remain.

5. The State contends that by preserving Padilla Bay in its natural state it thereby prevents a public harm, including to important commercial interests worth millions of dollars in revenue to the State and private interests. The

State argues that the prevention of such harm would allow the State to regulate Orion's property so far as to deny Orion all economic uses of its property. The Court rejects the State's contention. Precisely where that constitutional limit lies, this Court need not decide in this case. The record here establishes as a matter of law that in this case the government regulatory actions are not anywhere near the constitutional line. Moreover, in justice and fairness, the regulations here are designed to preserve Orion's property for the benefit of everyone. Again, in justice and fairness, the public benefit obtained by preserving Padilla Bay is a benefit, the cost of which should not be borne by Orion, alone.

6. The Court expressly reserves decision on the date of the defendants' taking of Orion's property and similarly

reserves decision on the public trust issue.

7. The appropriate remedy in this case is an award of Just Compensation, to be decided in a damages trial of this issue. The State of Washington has argued that damages is not an appropriate remedy. The plain command of the United States and Washington Constitutions is otherwise; they mandate the payment of Just Compensation for a taking of private property for a public use.

Even if the Constitutions were not so explicit as to the remedy, Just Compensation is, in the unique circumstances before this Court, particularly appropriate here. This case presents a pattern of over-regulation pursuant to a conscious governmental policy. That policy was to promote a public benefit by preventing Orion from using its property. The public has long

had the benefit of that property. In justice and fairness, Orion should be paid Just Compensation for the property taken from it. The State has intimated that the Court's decision casts an unreasonable burden on the State and handicaps its development of programs to protect the environment. Without deciding the role of such policy arguments against the explicit constitutional mandate, the Court is unconvinced by them here. This case stands alone, and the Court has decided it based on the special circumstances present here.

8. The Court denies the State's motion to dismiss Orion's inverse condemnation claims based on a three-year statute of limitations.

9. The Court concludes that Orion is not entitled to relief, as a matter of law, upon its equal protection claim. The regulations in question here aim at

protecting and preserving the natural condition of Padilla Bay. They do so to obtain a public benefit, not to harm Orion. Although harm results to Orion, that is not the specific intent.

10. The Court also concludes that Orion, as a matter of law, may not recover on its contractual impairment claim. The State originally sold the property in question and transferred ownership into private hands, indicating that the property was being sold for commercial purposes, but in doing so it was attempting to define property rights, not contractual rights. Orion's taking claims adequately address the property rights issues.

NOW, THEREFORE,

IT IS HEREBY ORDERED:

1. That the Plaintiff's Motion for Summary Judgment On Its Claim That the Defendants Have Taken Its Property By Excessive Regulation is hereby granted,

and the defendants' motions relating to Orion's excessive regulation claim are denied;

2. That the State of Washington's Motion for Summary Judgment of Dismissal Re: Remedy is denied, and the Court concludes and orders that Orion is entitled to an award of Just Compensation to be decided in a trial of the damages issue; and

3. That the State's Motion for Summary Judgment Re: Statute of Limitations, as it relates to Orion's inverse condemnation claims, is denied.

4. That the defendants' Motions for Summary Judgment on Orion's equal protection and contractual impairment causes of action are hereby granted, and these claims are dismissed.

DATED this 28 day of January, 1986.

/s/ Walter J. Deierlein, Jr.
JUDGE WALTER J. DEIERLEIN, JR.

Presented by:

HILLIS, CAIRNCROSS,
CLARK & MARTIN, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ James J. Ragen
James J. Ragen

Attorneys for Plaintiff

/s/ Charles Lean
CHARLES LEAN
Attorney for Defendant
State of Washington

/s/ John Moffat
JOHN MOFFAT
Attorney for Defendant
Skagit County

KELLER, ROHRBACK, WALDO
HISCOCK, BUTTERWORTH & FARDAL

By /s/ William C. Smart
William C. Smart
Irene M. Hecht
Attorneys for Defendant
Skagit County

APPENDIX E

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation, et al.,	)	
Plaintiffs,	)	NO. 82-2-00391-6
v.	)	ORDER GRANTING PLAINTIFFS' MOTION
STATE OF WASHINGTON, et al.,	)	ESTABLISHING DATE OF TAKING NOT LATER THAN
Defendants.	)	AUGUST 29, 1980

THIS MATTER has come before the Court on Defendant Skagit County's Motion dated January 19, 1986, Seeking Declaration of the Date of Taking as the Passage of the Shoreline Management Act, and Plaintiffs' Motion dated February 24, 1986, as well as the motions of all parties for summary judgment on Orion's claim that defendants have taken its property by excessive regulation.

The Court has considered the file, pleadings, and evidence on the issue now before the Court, including Affidavit of Joseph B. Genster, dated February 24, 1986; Affidavit of Richard L. Settle, dated January 14, 1986; Affidavit of Joseph B. Genster, dated October 11, 1985; Affidavit of Charles Lean, dated September 24, 1985; Affidavit of James J. Ragen, dated September 24, 1985; Affidavits of James J. Ragen dated June 14 and 18, 1985; Affidavit of Clinton Morrow dated June 13, 1985; Affidavit of Leah Erlich dated June 13, 1985; Affidavit of William C. Smart dated August 12, 1985; Affidavit of Richard H. Baumgarner dated September 12, 1985; Affidavit of Robert Schofield dated September 12, 1985; Affidavit of Clifford Anderson dated September 13, 1985; Affidavit of Terence C. Stevens dated September 13, 1985; Affidavit of Joseph R. Williams

dated September 13, 1985; Affidavit of Richard A. Burkhalter dated September 13, 1985; Affidavit of D. Rodney Mack dated September 13, 1985; Affidavit of Dr. Nancy Foster dated August 6, 1985; Affidavit of Dr. Allan Scholz dated September 10, 1985; Affidavit of Richard Burge dated August 6, 1985; Affidavit of Dr. Herbert H. Webber dated August 12, 1984; Affidavit of Russell F. Orrell dated August 2, 1985; Affidavit of Dr. Ronald M. Thom dated August 1, 1985; Affidavit of Kurt L. Fresh dated July 2, 1985; Affidavit of Dr. Robert J. Trumble dated August 2, 1985; Affidavit of Dr. David Armstrong dated August 1, 1985; Affidavit of Dr. Ronald C. Phillips dated October 1, 1985; Affidavit of Michael A. Davison dated July 29, 1985: Affidavit of Toby M. Michelena of July 29, 1985; Affidavit of Charles A. Simenstad dated July 23, 1985; Affidavit of Harwood

Bannister, dated May 14, 1985; Affidavit of Betsy Dwier, dated May 22, 1985; Affidavit of William C. Smart, dated March 28, 1983; Affidavit of Charles Lean, dated September 20, 1985; and, all other pleadings, affidavits, files, records and evidence on file.

In addition, the Court has considered previous portions of the record including the affidavits and other evidence set forth in its Order dated May 31, 1983 relating to the exhaustion of administrative remedies issue, including the Affidavits of John B. Skilling, sworn to January 3, 1983 and March 28, 1983; the Affidavit of Clinton W. Morrow, sworn to December 29, 1982; the Affidavits of Mark S. Clark, sworn to December 27, 1982 and January 6, 1983; and the exhibits to all of said affidavits; the Affidavits of Robert C. Schofield, sworn to October 18, 1982 and January 5, 1983, Bud Norris,

sworn to October 19, 1982 and January 10, 1983, Terrance Stevens, sworn to October 19, 1982; the deposition transcripts of Rodney Mack, taken March 3, 1983, and Robert C. Schofield, Bud Norris, Terrance C. Stevens, Jerry Mansfield, and David C. Rohrer, all taken March 2, 1983, and the Requests for Admissions and Admissions herein. The Court has also considered portions of other deposition transcripts submitted by counsel to the Court.

The Court has also considered the additional written and oral argument of counsel on this issue, including Defendant Skagit County's Memorandum in Support of Skagit County's Motion for Reconsideration and to Establish Date of Taking, dated January 20, 1986, and, Plaintiffs' Memorandum on Date of Taking and Measure of Damages, dated February 24, 1986. The Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Plaintiffs' Motion Establishing Date of Taking Not Later than August 29, 1980, the date the Padilla Bay National Estuarine Sanctuary officially came into existence, is hereby granted.

DONE IN OPEN COURT this 7th day of March, 1986.

/s/ Walter J. Dierlein, Jr.
Judge Walter J. Deierlein, Jr.

Presented by:

HILLIS, CAIRNCROSS,
CLARK & MARTIN, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ James J. Ragen
James J. Ragen
Attorneys for Plaintiff
Orion Corporation

//

//

Copy Received; Notice of
Presentation Waived:

/s/ Charles W. Lean
Charles W. Lean
Attorney for Defendant
State of Washington

KELLER, ROHRBACK, WALDO, HISCOCK,
BUTTERWORTH & PARDAL

/s/ William C. Smart
William C. Smart

/s/ Irene W. Hecht
Irene W. Hecht
Attorneys for Defendant
Skagit County

/s/ John R. Moffat
John R. Moffat
Attorney for Defendant
Skagit County

APPENDIX F

IN THE SUPERIOR COURT OF STATE OF WASHINGTON
FOR SKAGIT COUNTY

ORION CORPORATION, a Washington corporation,	)	
Plaintiff,	)	NO. 82-2-00391-6
vs.	)	ORDER ON PUBLIC TRUST DOCTRINE
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	

THIS MATTER comes before the court on cross motions for summary judgment of all parties, and the court having reviewed all the files and records herein, including specifically the following documents:

1. Memorandum in Support of Plaintiff's Motion for Summary Judgment on its Claim that Defendants Have Taken its Property by Excessive Regulation and

in Opposition to Defendant's Motion for Summary Judgment, dated June 17, 1985;

2. Skagit County's Memorandum in Support of Motion to Dismiss Cause of Action Re: Excessive Regulation, dated May 29, 1984;

3. Skagit County's Memorandum in Opposition to Orion's Motion for Summary Judgment Re: Taking by Excessive Regulation, dated June 13, 1985;

4. Skagit County's Supplement Memorandum in Opposition to Plaintiff's Motion for Summary Judgment Regarding Excessive Regulation and in Support of Skagit County's Motion for Summary Judgment, dated September 16, 1985;

5. State's Memorandum in Support of Motion for Summary Judgment Re: Taking, dated September 16, 1985;

6. Skagit County's Memorandum Re: Citations to Records that Plaintiff's Property had Already Been Regulated so as

to Prevent Development Before the Master Program was Developed, dated June 17, 1985;

7. Affidavit of James Regan, dated June 14, 1985;

8. Affidavit of James J. Regan, dated September 24, 1985;

9. Affidavit of Lea K. Erlich, dated June 13, 1985;

10. Affidavit of Clinton W. Morrow, dated June 13, 1985;

11. Motion and Memorandum to Strike Affidavit of James J. Regan;

12. Orion's Brief and Motion for Summary Judgment, dated June 18, 1985;

13. Affidavit of Robert Scofield dated September 12, 1985;

14. Deposition of Clinton Morrow taken July 25, 1985;

15. Deposition of John Skilling taken August 4, 1985;

16. Affidavit of Irene M. Hecht, dated September 16, 1985;

17. Affidavit of Terence C. Stevens dated September 13, 1985;

18. Affidavit of Dr. Nancy Foster dated August 6, 1985;

19. Affidavit of Joseph R. Williams dated September 13, 1985;

20. Affidavit of Dr. Ronald C. Phillips dated August 1, 1985;

21. Affidavit of Clifford Anderson dated September 13, 1985;

22. Affidavit of Dr. David Armstrong dated August 1, 1985;

23. Affidavit of Richard Burge dated August 6, 1985;

24. Affidavit of Richard A. Burkhalter dated September 13, 1985;

25. Affidavit of Michael A. Davison dated July 29, 1985;

26. Affidavit of Kurt L. Fresh dated July 2, 1985;

27. Affidavit of Toby M. Michelena dated July 29, 1985;

28. Affidavit of Russell F. Orrell dated August 2, 1985;

29. Affidavit of Dr. Allen Scholz dated September 10, 1985;

30. Affidavit of Charles A. Simenstad dated July 23, 1985;

31. Affidavit of Dr. Ronald Thom dated August 2, 1985;

32. Affidavit of Dr. Herbert H. Webber dated August 12, 1985;

33. Affidavit of Richard H. Bumgarner dated September 12, 1985;

34. Affidavit of D. Rodney Mack dated September 13, 1985;

35. Affidavit Charles Lean dated September 24, 1985;

36. Affidavits of John B. Skilling dated January 3, 1983 and Clinton W. Morrow dated December 29, 1982;

37. Affidavits of Mark S. Clark dated December 27, 1982 and January 6, 1983;

38. Affidavits of Robert C. Scofield dated October 18, 1982 and January 5, 1983;

39. Affidavits of Bud Norris dated October 19, 1982 and January 10, 1983;

40. Affidavit of Terence Stevens dated October 19, 1982;

41. Deposition of Rodney Mack taken March 3, 1983;

42. Deposition of Robert C. Scofield taken March 2, 1983;

43. Deposition of Bud Norris taken March 2, 1983;

44. Deposition of Terence Stevens taken March 2, 1983;

45. Deposition of Jerry Mansfield taken March 2, 1983;

46. Deposition of David C. Rohrer taken March 2, 1983;

47. Affidavit of William C. Smart regarding Deposition of Bud Norris, Terence Stevens, Robert Charles Scofield dated March 28, 1983;

48. Skagit County's Memorandum in Support of Motion for Summary Judgment dated October 18, 1982;

49. Skagit County's Reply Brief in Support of Motion for Summary Judgment, dated January 6, 1983;

50. Skagit County's Supplemental Brief in Support of Motion to Dismiss Complaint, dated April 1, 1983;

51. Affidavit of Richard L. Settle dated January 14, 1986;

52. Deposition of John Skilling;

53. Deposition of Clinton Morrow;

54. Plaintiff's Motion to Amend Complaint dated August 21, 1985;

55. Skagit County's Memorandum in Opposition to Motion to Amend Complaint dated September 16, 1985;

56. State's Memorandum in Opposition to Motion to Amend Complaint dated September 24, 1985;

57. Affidavit of Charles Lean re Padilla Bay Associates dated September 24, 1985;

58. Orion's Memorandum in Support of Motion to Amend Complaint;

59. Affidavit of Joseph B. Jester re Plaintiff's Memorandum in Support of Motion to Amend Complaint dated October 11, 1985;

60. Skagit County's Motions with respect to Padilla Bay Associates dated February 12, 1986;

61. Skagit County's Motion Seeking Declaration of Date of Taking as the Passage of the Shoreline Management Act dated January 19, 1986;

62. Defendant Skagit County's Memorandum in Support of Summary Judgment re Taking by Excessive Regulation as to Padilla Bay Associates;

63. Supplemental Memorandum of Skagit County in Support of its Motion to

Dismiss Padilla Bay Assocaites' [sic] Claim with Respect to a Claim by Excessive Regulation;

64. Defendant Skagit County's Memorandum in Support of Motion for a Partial Summary Judgment Re Damages dated May 29, 1985;

65. Affidavit of Betsy Dwyer dated May 22, 1985;

66. Affidavit of Horowit Bannister dated May 14, 1985;

67. Memorandum of the State of Washington in Support of Motion for Summary Judgment of Dismissal Re Remedy dated June 6, 1985; and

68. Any and all other pleadings, affidavits, documents, files or records on file with this court in the above-entitled cause as of the date of signing, and the court being fully informed in the premise, and the court having determined that the purpose of this order is to

render the court's decision on the public trust issue as expressly reserved in paragraph 6 of its Order Granting Plaintiff's Motion for Summary Judgment on its Claim That The Defendants Have Taken Its Property By Excessive Regulation; Denying Defendants' Motions for Summary Judgment Regarding the Same Claim; Granting Defendants Motion for Summary Judgment Dismissing Plaintiff's Equal Protection and Contractual Impairment Claims entered June 29, 1986.

The court hereby concludes as a matter of law:

1. There are no genuine issues of material fact relevant to the public trust issues.

2. In 1971, prior to adoption of the Shoreline Management Act, Chapter 90.58 RCW, there existed as part of the common law of this state a right of the public to make use of the navigable waters

of the state for navigation, fishing, recreational boating and swimming. Private owners of beds underlying navigable waters could not make any use of those beds in a manner which substantially impaired public navigational rights.

3. The common law doctrine applied to Padilla Bay, an area of great beauty and recreational value for which there was no governmental planning designed to protect public navigational rights. For purposes of public recreational navigation, Padilla Bay is navigable to the line of ordinary high water.

4. Not all uses of Padilla Bay tidelands would substantially impair public navigational rights; therefore, defendants' motions to dismiss based upon this doctrine should be denied.

5. The public trust doctrine, or public navigational right, does operate to reduce damages. Neither the state nor

county can be held to "take" property rights which did not exist at common law. Damages award to plaintiff shall not include any reduction in property value, lost profits, or any other element of damage resulting from the inability of plaintiffs to use their tidelands in a manner which would substantially impair public navigational rights.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That defendants' motions to dismiss based upon the public trust doctrine, or public navigational rights, are denied;

2. That damages awarded to plaintiffs will not include any element of damage resulting from plaintiffs' inability to use their property in a manner which substantially impairs public rights.

//

DONE IN OPEN COURT this 7 day of March, 1986.

/s/ Walter J. Deierlein, Jr.
JUDGE/COMMISSIONER

Presented by:

/s/ Irene M. Hecht
IRENE M. HECHT
Keller Rohrback
Attorneys for Skagit County

Copy Received; Notice of Presentation Waived:

/s/ Charles W. Lean
CHARLES W. LEAN
Assistant Attorney General
Attorney for the State Defendants

/s/ Mark S. Clark
MARK S. CLARK
Hillis Cairncross, Clark & Martin
Attorneys for Plaintiff

APPENDIX G

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. 82-2-00391-6 ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER ORDER ON THE PUBLIC TRUST DOCTRINE

THIS MATTER has come before the Court upon plaintiffs' Motion to Reconsider Order on the Public Trust Doctrine, dated March 18, 1986; the Court having reviewed the file, pleadings, and evidence herein and having considered the written and oral argument of counsel, including the Affidavit of Joseph B. Genster, dated March 18, 1986, and, the Court having concluded that there are no grounds for reconsideration;

NOW, THEREFORE, IT IS HEREBY ORDERED, that plaintiffs' Motion for Reconsideration, dated March 18, 1986, is denied.

DONE IN OPEN COURT this 25 day of March, 1986.

/s/
Judge Walter J. Deierlein, Jr.

//

//

Presented by:

HILLIS, CAIRNCROSS,
CLARK & MARTIN, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ Joseph B. Genster
Joseph B. Genster
Attorneys for Plaintiff
Orion Corporation

Copy Received; Notice of
Presentation Waived:

Charles W. Lean
Attorney for Defendant
State of Washington

John R. Moffat
Attorney for Defendant
Skagit County

KELLER, ROHRBACK, WALDO, HISCOCK,
BUTTERWORTH & PARDAL

William C. Smart

Irene W. Hecht
Attorneys for Defendant
Skagit County

JBG02-G3

APPENDIX H

IN THE SUPERIOR COURT OF
WASHINGTON IN AND FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation, Plaintiff, vs. STATE OF WASHINGTON, et. al., Defendants.	NO. 82-2-00391-6 ORDER DISMISSING CLAIMS FOR PRECONDEMNATION CONDUCT AND PHYSICAL INVASION

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled Court; the Court having heard argument of counsel and having reviewed the files and records herein, including specifically;

1.	Skagit County's Memorandum in Support of Motion to Dismiss Claims for Physical Invasion and Unfair Precondemnation Activity	3/21/86

2.	Affidavits of Robert Schofield		10/18/82 1/05/83 2/13/86
3.	Affidavits of Skagit County Commissioners Walberg and Norris	Walberg Norris	2/11/86 1/07/83
4.	Deposition of Clinton Morrow		
5.	Deposition of John Skilling		
6.	Affidavit of William C. Smart re: Deposition of Milton Martin		3/21/86
7.	Padilla Bay Estuarine Sanctuary Management Plan		
8.	Skagit County's Motion for Summary Judgment of Dismissal re: Claim for Inverse Condemnation due to Unlawful Precondemnation Conduct		
9.	Skagit County's Motion for Summary Judgment of Dismissal re: Plaintiff's Claim for Inverse Condemnation Due to Invasion		

10.	Affidavit of William C. Smart re: Deposition of John Skilling	8/12/85
11.	Affidavit of Clinton W. Morrow	12/29/82 6/13/85
12.	All documents referenced in the Court's order on the measure of just compensation filed in this cause	3/25/86

The Court having construed all the evidence in a light most favorable to plaintiffs and having determined that no material facts are in dispute; the Court further finding that the undisputed facts demonstrate no physical invasion of plaintiff's tidelands by defendants, and no abusive preacquisition activity on the part of defendants which would amount to an unconstitutional taking of plaintiffs' property,

Now, it is hereby ordered that:

Plaintiff's claims against Skagit County and the State based on physical

invasion and unfair precondemnation conduct are dismissed.

DATED THIS 25 day of March, 1986.

/s/
JUDGE

PRESENTED BY:

KELLER, ROHRBACK, WALDO,
HISCOCK, BUTTERWORTH & FARDAL

BY: /s/ William C. Smart
WILLIAM C. SMART
Attorney for Def. Skagit County

BY: /s/ Irene M. Hecht
IRENE M. HECHT
Attorney for Def. Skagit County

SKAGIT COUNTY PROSECUTING ATTORNEY

BY: /s/ John R. Moffat
JOHN R. MOFFAT
Chief Civil Deputy
Attorney for Def. Skagit County

APPENDIX I

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation, et al.,	)	
Plaintiffs,	)	NO. 82-2-00391-6
v.	)	ORDER ON THE MEASURE OF JUST COMPENSATION
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	

THIS MATTER comes before the Court upon all parties' motions for summary judgment relating to plaintiff Orion Corporation's claim that defendants Skagit County and the State of Washington have taken Orion's property be excessive regulation. On January 29, 1986, this Court entered an Order granting Orion's summary judgment motion on that claim. The Court ruled that the appropriate remedy in this case is an award of just

compensation, to be decided in the damages trial of that issue. The purpose of this Order is to render the Court's decision on the measure of just compensation to be awarded in this case.

The Court has considered the file, pleadings, and evidence on the issue now before the Court, including Affidavit of Joseph B. Genster, dated February 24, 1986; Affidavit of Richard L. Settle, dated January 14, 1986; Affidavit of Joseph B. Genster, dated October 11, 1985; Affidavit of Charles Lean, dated September 24, 1985; Affidavit of James J. Ragen dated June 14 and 18, 1985; Affidavit of Clinton Morrow dated June 13, 1985; Affidavit of Leah Erlich dated June 13, 1985; Affidavit of William C. Smart dated August 12, 1985; Affidavit of Richard H. Baumgarner dated September 12, 1985; Affidavit of Robert Schofield dated September 12, 1985; Affidavit of Clifford

Anderson dated September 13, 1985; Affidavit of Terence C. Stevens dated September 13, 1985; Affidavit of Joseph R. Williams dated September 13, 1985; Affidavit of Richard A. Burkhalter dated September 13, 1985; Affidavit of D. Rodney Mack dated September 13, 1985; Affidavit of Dr. Nancy Foster dated August 6, 1985; Affidavit of Dr. Allan Scholz dated September 10, 1985; Affidavit of Richard Burge dated August 6, 1985; Affidavit of Dr. Herbert H. Weber dated August 12, 1985; Affidavit of Russell F. Orrell dated August 2, 1985; Affidavit of Dr. Ronald M. Thom dated August 1, 1985; Affidavit of Kurt L. Fresh dated July 2, 1985; Affidavit of Dr. Robert J. Trumble dated August 2, 1985; Affidavit of Dr. David Armstrong dated August 1, 1985; Affidavit of Dr. Ronald C. Phillips dated August 1, 1985; Affidavit of Michael A. Davison dated July 29, 1985; Affidavit of Toby M.

Michelena of July 29, 1985; Affidavit of Charles A. Simenstad dated July 23, 1985; Affidavit of Harwood Bannister, dated May 14, 1985; Affidavit of Betsy Dwier, dated May 22, 1985; Affidavit of William C. Smart, dated March 28, 1983; Affidavit of Charles Lean, dated September 20, 1985; and, all other pleadings, affidavits, files, records and evidence on file.

In addition, the Court has considered previous portions of the record including the affidavits and other evidence set forth in its Order dated May 31, 1983 relating to the exhaustion of administrative remedies issue, including the Affidavits of John B. Skilling, sworn to January 3, 1983 and March 28, 1983; the Affidavit of Clinton W. Morrow, sworn to December 29, 1982; the Affidavits of Mark S. Clark, sworn to December 27, 1982 and January 6, 1983; and the exhibits to

all of said affidavits; the Affidavits of Robert C. Schofield, sworn to October 18, 1982 and January 5, 1983, Bud Norris, sworn to October 19, 1982 and January 10, 1983, Terrance Stevens, sworn to October 19, 1982; the deposition transcripts of Rodney Mack, taken March 3, 1983, and Robert C. Schofield, Bud Norris, Terrance C. Stevens, Jerry Mansfield, and David C. Rohrer, all taken March 2, 1983, and the Requests for Admissions and Admissions herein and any and all other affidavits and memoranda on file before March 25, 1986. The Court has also considered portions of other deposition transcripts submitted by counsel to the Court.

The Court has also considered the additional written and oral argument of counsel on this issue, including Defendant Skagit County's Memorandum on Damages and in Support of Motions Related Thereto,

dated February 24, 1986 and, Plaintiffs' Memorandum on Date of Taking and Measure of Damages, dated February 24, 1985.

The Court concludes as a matter of law:

1. There are no genuine issues of material fact precluding the Court from ruling on this question of law.

2. That under the special circumstances and unique facts of this case defendants' regulations and other affirmative action have so interfered with Orion's property rights as to constitute a complete and permanent taking of Orion's property.

3. The defendants argue that the harm done to Orion can be remedied through the amendment or rescission of the offending regulations and the payment of interim damages. The Court rejects that argument. This is not a case of temporary or inadvertent excessive regulation. The

record demonstrates that defendants consciously and successfully sought to promote a permanent public benefit, the preservation of Padilla Bay in its natural state, through their regulations and actions.

NOW, THEREFORE, IT IS HEREBY ORDERED, that just compensation will be awarded for a complete and permanent taking of Orion's property.

DONE IN OPEN COURT this 25th day of March, 1986.

/s/ Judge Walter J. Dierlein, Jr.
Judge Walter J. Dierlein, Jr.

Presented by:

HILLIS, CAIRNCROSS,
CLARK & MARTIN, P.S.

By /s/ Mark S. Clark
Mark S. Clark

By /s/ James J. Ragen
James J. Ragen

By /s/ Joseph B. Genster
Joseph B. Genster
Attorneys for Plaintiff
Orion Corporation

Copy Received; Notice of
Presentation Waived:

Charles W. Lean
Attorney for Defendant
State of Washington

John R. Moffat
Attorney for Defendant
Skagit County

KELLER, ROHRBACK, WALDO, HISCOCK,
BUTTERWORTH & PARDAL

William C. Smart

Irene W. Hecht
Attorneys for Defendant
Skagit County

APPENDIX J

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation, et al.,	)	
Plaintiffs,	)	NO. 82-2-00391-6
v.	)	ORDER ON THE MEASURE OF JUST COMPENSATION
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	

THIS MATTER comes before the Court upon all parties' motions for summary judgment relating to plaintiff Orion Corporation's claim that defendants Skagit County and the State of Washington have taken Orion's property by excessive regulation. On January 29, 1986, this Court entered an Order granting Orion's summary judgment motion on that claim. The Court ruled that the appropriate remedy in this case is an award of just

compensation, to be decided in the damages trial of that issue. The purpose of this Order is to render the Court's decision on the measure of just compensation to be awarded in this case.

The Court has considered the file, pleadings, and evidence on the issue now before the Court, including Affidavit of Joseph B. Genster, dated February 24, 1986; Affidavit of Richard L. Settle, dated January 14, 1986; Affidavit of Joseph B. Genster, dated October 11, 1985; Affidavit of Charles Lean, dated September 24, 1985; Affidavit of James J. Ragen, dated September 24, 1985; Affidavits of James J. Ragen dated June 14 and 18, 1985; Affidavit of Clinton Morrow dated June 13, 1985; Affidavit of Leah Erlich dated June 13, 1985; Affidavit of William C. Smart dated August 12, 1985; Affidavit of Richard H. Baumgarner dated September 12, 1985; Affidavit of Robert

Schofield dated September 12, 1985; Affidavit of Clifford Anderson dated September 13, 1985; Affidavit of Terence C. Stevens dated September 13, 1985; Affidavit of Joseph R. Williams dated September 13, 1985; Affidavit of Richard A. Burkhalter dated September 13, 1985; Affidavit of D. Rodney Mack dated September 13, 1985; Affidavit of Dr. Nancy Foster dated August 6, 1985; Affidavit of Dr. Allan Scholz dated September 10, 1985; Affidavit of Richard Burge dated August 6, 1985; Affidavit of Dr. Herbert H. Webber dated August 12, 1985; Affidavit of Russell F. Orrell dated August 2, 1985; Affidavit of Dr. Ronald M. Thom dated August 1, 1985; Affidavit of Kurt L. Fresh dated July 2, 1985; Affidavit of Dr. Robert J. Trumble dated August 2, 1985; Affidavit of Dr. David Armstrong dated August 1, 1985; Affidavit of Dr. Ronald C. Phillips dated August 1, 1985; Affidavit of Michael A.

Davison dated July 29, 1985: Affidavit of Toby M. Michelena of July 29, 1985; Affidavit of Charles A. Simenstad dated July 23, 1985; Affidavit of Harwood Bannister, dated May 14, 1985; Affidavit of Betsy Dwier, dated May 22, 1985; Affidavit of William C. Smart, dated March 28, 1983; Affidavit of Charles Lean, dated September 20, 1985; and, all other pleadings, affidavits, files, records and evidence on file.

In addition, the Court has considered previous portions of the record including the affidavits and other evidence set forth in its Order dated May 31, 1983 relating to the exhaustion of administrative remedies issue, including the Affidavits of John B. Skilling, sworn to January 3, 1983 and March 28, 1983; the Affidavit of Clinton W. Morrow, sworn to December 29, 1982; the Affidavits of Mark S. Clark, sworn to December 27, 1982

and January 6, 1983; and the exhibits to all of said affidavits; the Affidavits of Robert C. Schofield, sworn to October 18, 1982 and January 5, 1983, Bud Norris, sworn to October 19, 1982 and January 10, 1983, Terrance Stevens, sworn to October 19, 1982; the deposition transcripts of Rodney Mack, taken March 3, 1983, and Robert C. Schofield, Bud Norris, Terrance C. Stevens, Jerry Mansfield, and David C. Rohrer, all taken March 2, 1983, and the Requests for Admissions and Admissions herein and any and all other affidavits and memoranda on file before March 25, 1986. The Court has also considered portions of other deposition transcripts submitted by counsel to the Court.

The Court has also considered the additional written and oral argument of counsel on this issue, including Defendant Skagit County's Memorandum on Damages and

in Support of Motions Related Thereto, dated February 24, 1986 and, Plaintiffs' Memorandum on Date of Taking and Measure of Damages, dated February 24, 1986.

The Court concludes as a matter of law:

1. There are no genuine issues of material fact precluding the Court from ruling on this question of law.

2. That under the special circumstances and unique facts of this case defendants' regulations and other affirmative action have so interfered with Orion's property rights as to constitute a complete and permanent taking of Orion's property.

3. The defendants argue that the harm done to Orion can be remedied through the amendment or rescission of the offending regulations and the payment of interim damages. The Court rejects that argument. This is not a case of temporary

or inadvertent excessive regulation. Defendants sought to promote a permanent public benefit, the preservation of Padilla Bay in its natural state, through their regulations and actions.

NOW, THEREFORE, IT IS HEREBY ORDERED, that just compensation will be awarded for a complete and permanent taking of Orion's property.

IT IS FURTHER ORDERED that the measure of damages to be used in determining the value of Orion's tidelands is the difference in the value of Orion's tidelands: 1) as burdened by any federal or state statutes or regulations in effect prior to the creation of the Estuarine Sanctuary in August, 1980, including specifically but not limited to the Shoreline Management Act, the regulations enacted pursuant to it and the Skagit County Shoreline Management Master Program (before), and 2) the value of Orion's

tidelands as burdened by the creation of the Estuarine Sanctuary in August, 1980 (after).

DONE IN OPEN COURT this 25th day of March, 1986.

/s/ Walter J. Deierlein, Jr.
The Honorable Walter J. Deierlein, Jr.

Presented by: **[THE ORDER IN THE FORM FINALLY SIGNED BY THE COURT WAS PRESENTED BY THE STATE OF WASHINGTON AND SKAGIT COUNTY]**

HILLIS, CAIRNCROSS,
CLARK & MARTIN, P.S.

BY: _____
Mark S. Clark

BY: _____
James J. Ragen

BY: _____
Joseph B. Genster
Attorneys for Plaintiff
Orion Corporation

Copy received; Notice of
Presentation Waived:

BY: /s/ Charles W. Lean
Charles W. Lean
Attorney for Def. State of Wash.

BY: /s/ John R. Moffat
JOHN R. MOFFAT
Attorney for Def. Skagit County

Copy Received; Notice of
Presentation Waived:

BY: /s/ William C. Smart
William C. Smart

BY: /s/ Irene W. Hecht
Irene W. Hecht
Attorneys for Def. Skagit County

APPENDIX K

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX L

IN THE SUPERIOR COURT OF WASHINGTON
FOR SKAGIT COUNTY

THE ORION CORPORATION, a Washington corporation,	)	
Plaintiff,	)	NO. 82-2-00391-6
vs.	)	AFFIDAVIT OF CLINTON W. MORROW
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	
STATE OF WASHINGTON	)	
COUNTY OF KING	)	ss.

CLINTON W. MORROW, after being first duly sworn, deposes and says:

1. The Orion Corporation retained me in 1974 to investigate possible uses of its tideland property in Padilla Bay, Skagit County, Washington. Since then, I have worked on Orion's behalf in regard to that property. The facts stated herein

are based upon my personal knowledge, and I am competent to testify to these facts.

2. In late 1977, Steve Sweeney of the Washington State Department of Game contacted me to solicit information from The Orion Corporation regarding Padilla Bay. He indicated that the Department of Game was conducting a study on behalf of the United States Fish and Wildlife Service. Orion provided studies it had had conducted regarding its property; in exchange, Sweeney promised me a copy of his report. After much time had passed, I requested a copy of the report in writing. We then discussed the progress of his work orally. Finally, Sweeney indicated that he had completed his work and sent the report to Gary Kline of the Fish & Wildlife Service for final completion.

3. I then called Gary Kline. He indicated that the report was in draft

form. It was not yet ready, but Kline indicated that he would let me know when the report was ready. I later called Kline again. He told me that the report had not been published. He conveyed the impression that the report would not be forthcoming.

4. I then called Sweeney. I reminded him of the agreement to produce this report in exchange for the information Orion provided the Department of Game. Sweeney told me that he did not know what was going on. He was not authorized to give me the report, he said. He also said that there was some kind of "political shenanigans going on involving the DOE." He further said, "I don't know what to tell you."

5. I then requested the report under the Freedom of Information Act. No response was forthcoming. I later learned that Gary Kline had resigned his position

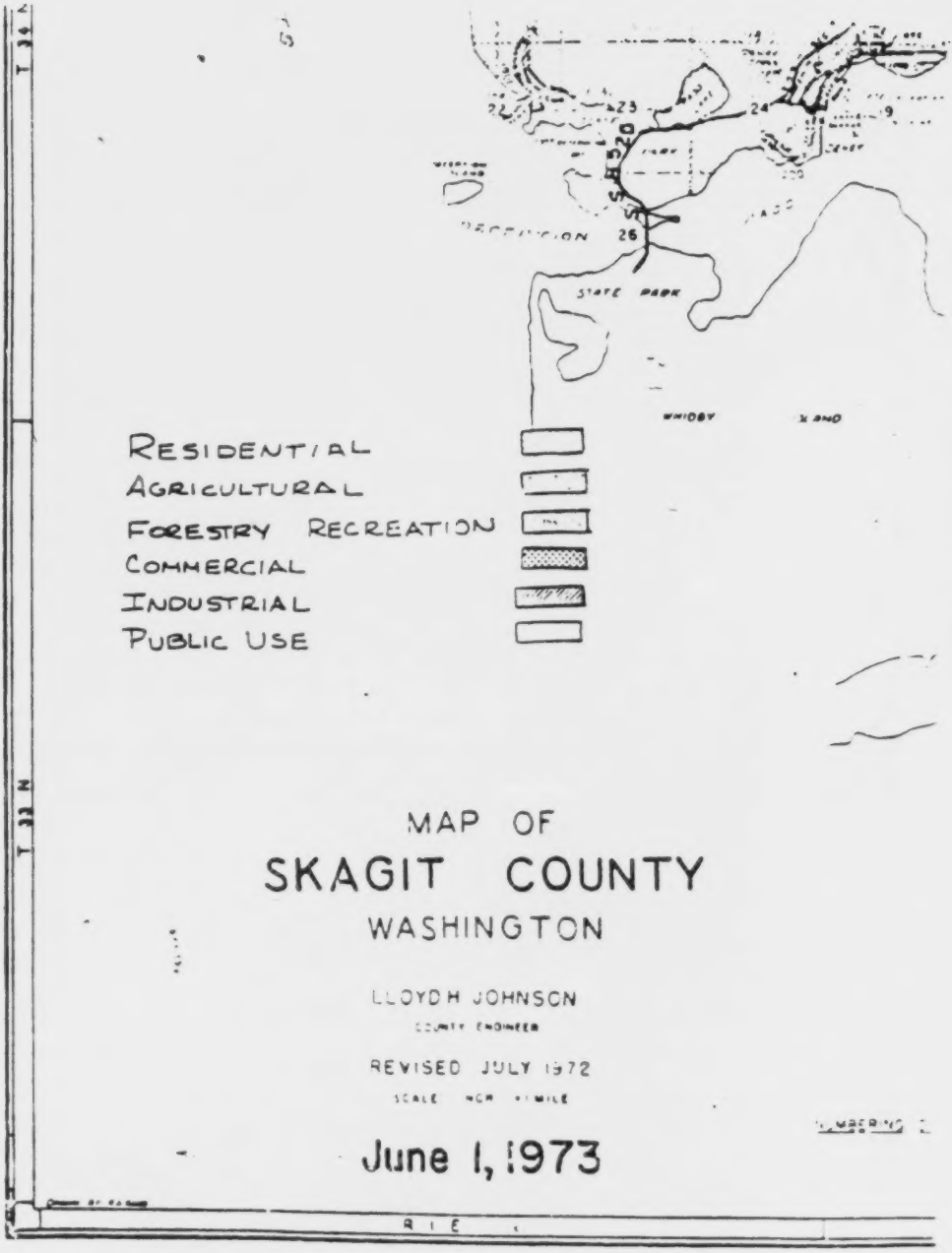
at the Fish & Wildlife Service and was working as a gardner. I called him and asked him why the report had not been published. He told me that "it [the report] had been quashed because it suggested values that would have made acquisition impossible." I asked him at whose direction the report had been quashed. He said "the Department of Ecology." I asked who specifically. He said "Milt Martin."

/s/ Clinton W. Morrow
CLINTON W. MORROW

SUBSCRIBED AND SWORN to before me this 13th day of June, 1985.

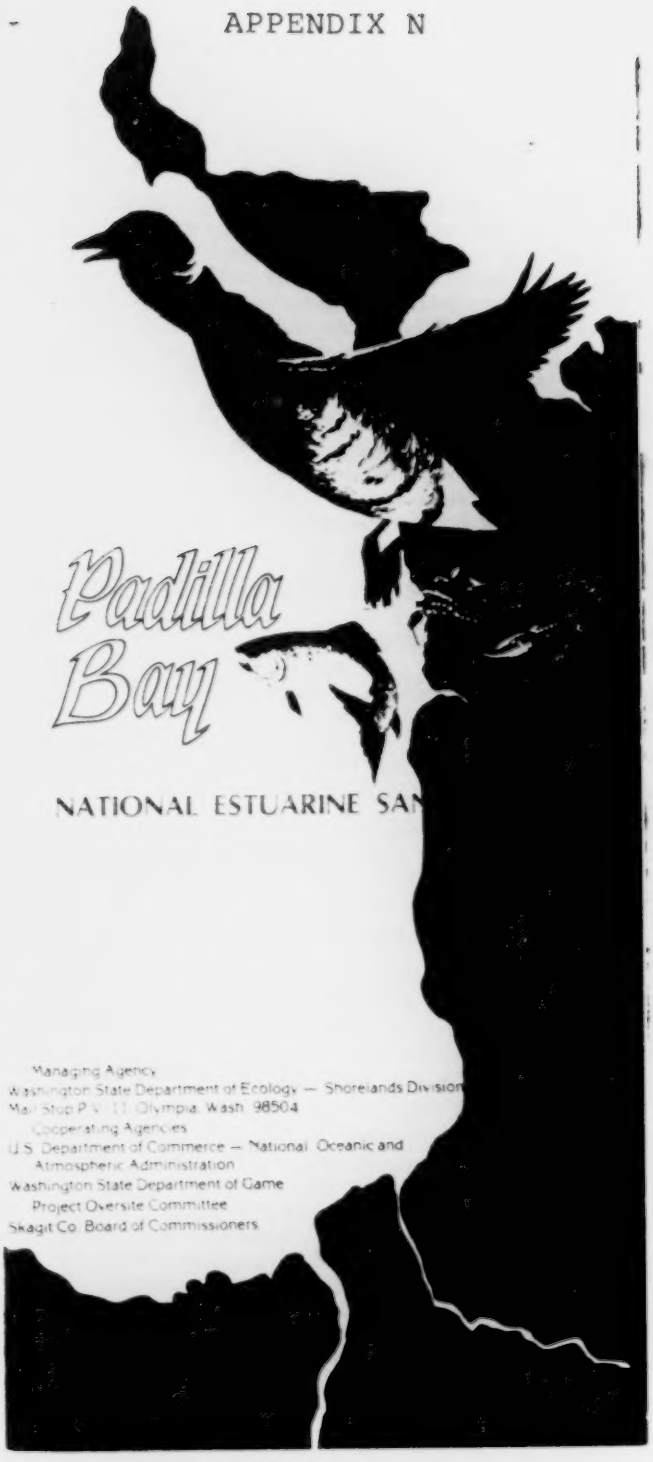
/s/ Karla A. Kendig
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

APPENDIX M


RESIDENTIAL
AGRICULTURAL
FORESTRY RECREATION
COMMERCIAL
INDUSTRIAL
PUBLIC USE
STATE PARK
MAP OF
SKAGIT COUNTY
WASHINGTON
LLOYD H JOHNSON
REVISED JULY 1972
June 1, 1973

PADILLA
BAY
SAMISH
BAY
SR 20
SR 20
SR 237
SR 237
SR 536

APPENDIX N


Padilla Bay
NATIONAL ESTUARINE SAN
Managing Agency
Washington State Department of Ecology — Shorelands Division
Mail Stop PV-11, Olympia, Wash. 98504
Cooperating Agencies
U.S. Department of Commerce — National Oceanic and Atmospheric Administration
Washington State Department of Game
Project Oversite Committee
Skagit Co. Board of Commissioners

BEST AVAILABLE COPY

The effort to protect Padilla Bay began almost 23 years ago when concerned citizens together with local and state officials expressed an interest in preserving the bay for public use. As the value of Padilla Bay, one of the largest relatively undisturbed tideflat areas in Puget Sound, became known, the citizens were joined in their protective effort by the private sector, federal agencies, universities and environmentally oriented organizations.

The earlier citizen efforts had turned back several schemes by private developers to convert the Bay into residential and industrial areas.

In 1979 the state Department of Ecology, on behalf of the State of Washington and acting under authority of the Federal Coastal Zone Management Act of 1972, as amended, the State Shoreline Management Act [illegible] with the approval of the Skagit County Board of Commissioners began the effort to establish Padilla [illegible]

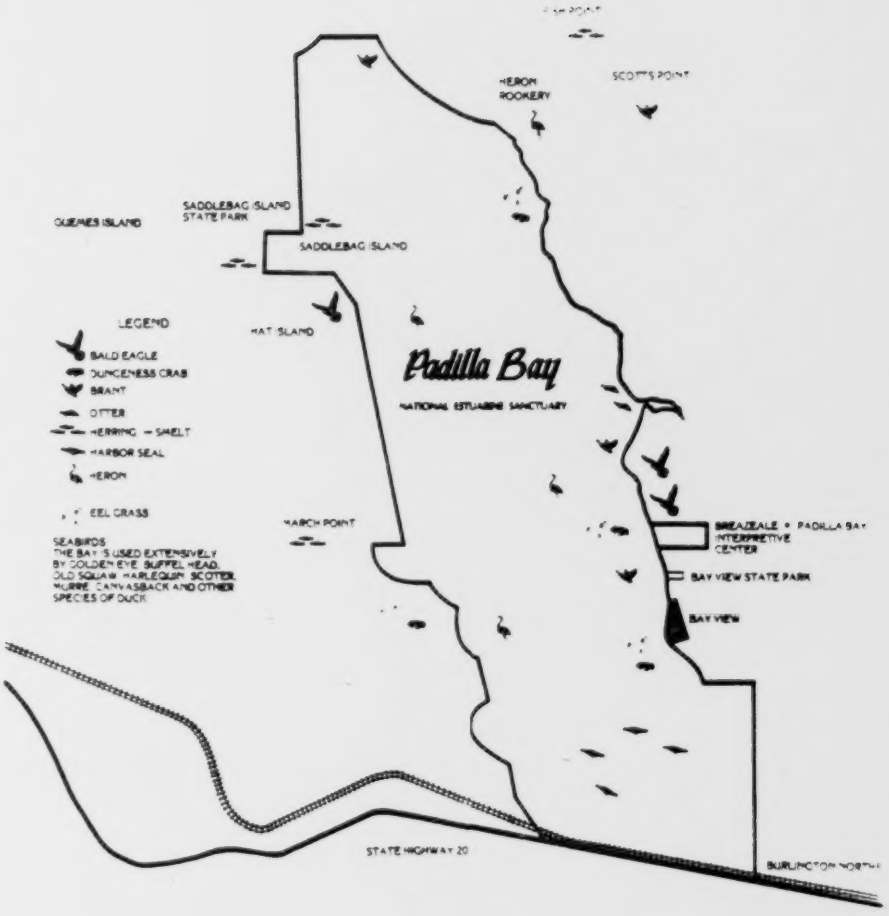
The Department of Ecology [illegible]

[illegible] coordinating private government efforts, the committee finally agreed [illegible]

[illegible] committee decisions were based [illegible] decision-making and co-existance of an environmental area with industry philosophy which manifested itself in the desire of committee members to provide a public use facility that would make the community a more liveable place to reside, earn a living and raise families. This was [illegible] together with a need to establish Padilla Bay as part of a National Estuarine Sanctuary system.

On September 1, 1980, in response to a request by the State Department of Ecology, the U.S. Department of Commerce (NOAA) awarded a $2,225,738 grant to the state to acquire 11,600 acres of tidelands, develop tideland access areas, and approximately eight miles of nature trails, wildlife habitat areas, and construct a building for interpretive and educational purposes.

Through the cooperation of Skagit County citizens, the private sector and governmental agencies, Padilla Bay was established in perpetuity as one of 8 National Estuarine Sanctuaries.


HERON
ROOKERY
SCOTT'S POINT
SADDLEBAG ISLAND
STATE PARK
GUEMES ISLAND
SADDLEBAG ISLAND
LEGEND
BALD EAGLE
DUNGENESS CRAB
BRANT
OTTER
HERRING + SMELT
HARBOR SEAL
HERON
EEL GRASS
SEABIRDS
THE BAY IS USED EXTENSIVELY
BY GOLDEN EYE, BUFFEL HEAD,
OLD SQUAW, HARLEQUIN, SCOTER,
MURRE, CANVASBACK AND OTHER
SPECIES OF DUCK
HAT ISLAND
Padilla Bay
NATIONAL ESTUARINE SANCTUARY
MARCH POINT
BREAZEALE + PADILLA BAY
INTERPRETIVE
CENTER
BAY VIEW STATE PARK
BAY VIEW
STATE HIGHWAY 20

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1575

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington
TIMOTHY R. MALONE*
Assistant Attorney General
CHARLES W. LEAN
Assistant Attorney General

Office of the Attorney General
7th Floor, Highways-Licenses Building
Olympia, WA 98504-8071
(206) 459-6161
Counsel for Respondent
*Counsel of Record

No. 87-1575

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington
TIMOTHY R. MALONE*
Assistant Attorney General
CHARLES W. LEAN
Assistant Attorney General

Office of the Attorney General
7th Floor, Highways-Licenses Building
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court of Washington "take" Orion's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution by ruling that Orion's property is subject to a public trust doctrine which grants the general public a right to use the navigable waters over Orion's property for navigation, fishing and recreation?

2. Did the state take Orion's property by invasion in violation of the Fifth and Fourteenth Amendments?

3. Did the Supreme Court of the State of Washington deny Orion minimal constitutional protection under the Fifth and Fourteenth Amendments by refusing to recognize a cause of action for oppressive pre-acquisition conduct when the court found no evidence to support such a cause

of action capable of withstanding a motion for summary judgment?

4. Is it proper for the Supreme Court of Washington to characterize the Washington State Shoreline Management Act and regulations adopted thereunder as adopted in order to safeguard the "public interest in health, the environment, and the fiscal integrity of the area" and thus insulated from Orion's regulatory taking claim, when Orion's intentions for its property in conflict with the Act will harm the environment and commercial fishing and crabbing?

5. Did the state, under the totality of the circumstances here and under the present procedural posture of the case, permanently and completely take Orion's property in violation of the Fifth and Fourteenth Amendments?

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No. 87-1575

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

Respondents, State of Washington, various state officials, and Skagit County, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Washington Supreme Court's decision in this case.

STATEMENT OF THE CASE

Padilla Bay. Padilla Bay is a large, shallow, brackish area of Puget Sound, located on the eastern side of the Sound about 70 miles north of Seattle, Washington. The area of the Bay is about 14,500 acres, of which 60 percent is exposed at mean lower low tide. The mean daily tidal range is about 8.4 feet.

Padilla Bay sustains a diverse and densely populated ecology, which includes many species important to man. The bird population is huge. Some 50,000 ducks normally winter in Padilla Bay, which also supports one of the densest wintering populations of peregrine falcons reported in North America. The land around the Bay also has significant populations of eagles, various types of owls, and great blue heron.

Much of the life of Padilla Bay depends, directly or indirectly, upon the eelgrass beds. Padilla Bay contains the second largest eelgrass bed on the West Coast. This eelgrass "meadow" not only serves as a nursery for commercially important fish and shellfish, but also acts as a "giant food factory" pumping nutrients into the rest of Puget Sound. The affidavit of Dr. Ronald C. Phillips gives an example which highlights the importance of eelgrass:

> In 1931-1933 a disease destroyed 90% to 100% of the eelgrass in the North Atlantic. Following the die-off many animals associated with eelgrass disappeared. The impacts on the human economy were severe. Scallops, fish, clams and crabs declined or disappeared . . . .

Eelgrass beds are very important to the growth of juvenile salmon, whose greatest growth occurs in such areas. Padilla Bay accounts for eight to ten

percent of all Puget Sound dungeness crab production. In 1984, 205,400 crab were taken from the area. In 1975, over 300,000 were taken. These were about evenly divided between sport and commercial catches.

Padilla Bay is located outside the urban areas of Puget Sound. Aside from the small town of Bayview, located on the eastern shore of the Bay, the land around the Bay consists mostly of farms and individual residences on the bluffs overlooking the water.

Navigation on Padilla Bay. The town of Bayview was platted in 1884. A sawmill and shingle mill were built. Products and logs were shipped by water through Padilla Bay. "Tugs and other boats of medium draft reach the town easily at high tide." An Illustrated History of Skagit and Snohomish Counties, pp. 238-39, Interstate Pub. Co.

(1906). Present day navigation is primarily recreational, and there are three boat launch ramps on the Bay. The trial court, in an unchallenged finding, held that for the purpose of public recreational navigation, Padilla Bay is navigable. Orion Corp. v. State, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) [Orion II], Pet. App. at A-45.

Orion's Efforts to Develop Padilla Bay. Beginning in 1906, Padilla Bay tidelands were sold by the state. The record does not show who purchased these tidelands, or why. At least 225 acres now held by the Orion Corporation [hereinafter Orion] were purchased subject to a reversionary clause providing that the tidelands would revert to the state if abandoned or used for purposes other than oyster cultivation.

In 1963, Orion began purchasing tideland acreage for the purpose of dredging and filling Padilla Bay to create a residential, Venetian-style community. By 1968, Orion had accumulated about 5,600 acres of Padilla Bay tidelands. (Orion holds no uplands.) Orion's tidelands were not contiguous, however, and some intervening property owners were opposed to the development. The State Board of Tax Appeals later concluded, with respect to Orion's proposed development:

> [F]urther progress of the contemplated development was halted in 1968 due to the state of the economy and opposition of the Samish Padilla Conservation Association formed to block the projected development by buying some strategically located tracts to prevent the dredging necessary for the beginning of the development.

Orion never did acquire these "strategically located" tracts; nor did it ever

acquire the necessary economic backing for its proposed Venetian-style community.

On December 4, 1969 the Washington Supreme Court announced its decision in Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970), holding that a fill of a lake bed which interfered with the public's right of navigation must be removed. Since the lake bed in question was only periodically submerged due to operation of a power dam at the end of the lake, the analogy to tidelands was obvious. The Governor of the State, the State Attorney General, petitioners for rehearing before the State Supreme Court, the Petition for Writ of Certiorari to this Court[1], title insurance

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[1]The petition for certiorari in Gallagher v. Wilbour, October Term, 1970,
(Footnote Continued)

companies and developers all concluded that the decision was potentially applicable to tidelands underlying navigable water.

On January 19, 1970, Governor Daniel J. Evans wrote the Chairman of the State Senate and House Natural Resources Committees announcing that he intended to "refuse to grant the concurrence of the State of Washington" to any pending U.S. Army Corps of Engineers permit applications for overwater construction or filling of tidal waters. This was popularly termed a

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(Footnote Continued)
No. 492, argued, as petitioner does here, that recognition of public rights in navigable waters was a "sudden change in state law" resulting in an unconstitutional taking without compensation. The state responded (as we do here) by pointing to repeated recognition of the public trust or public navigational rights in early Washington caselaw. See, e.g., New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901); Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 (1904); Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915).

"moratorium." Since at that time the state had no statute regulating fills of privately-owned tidelands, if a "moratorium" existed, it was due to regulations of the Corps of Engineers. This event had no direct impact on Orion, which has never applied for a permit from the Corps of Engineers.

Effective June 1, 1971, the Washington Legislature adopted the state's Shoreline Management Act, chapter 90.58 Wash. Rev. Code. That Act was intended to allow some development of shorelines of the state "in a manner which, while allowing for limited reduction of the rights of the public in the navigable waters, will promote and enhance the public interest." Wash. Rev. Code § 90.58.020.

After the adoption of the Shoreline Management Act, Orion discontinued its efforts to create a Venetian-style

community in Padilla Bay. Orion II, Pet. App. at A-11. Thereafter, Orion's efforts were directed primarily at securing a public buyer for the property. Orion considered and rejected two separate joint venture proposals in aquaculture on its property, both of which would have been permissible under the regulations in force at the time. Orion II, Pet. App. at A-11 and A-12.

In 1974, Orion rejected an offer to purchase the property by the State Department of Game, based upon a contemporaneous appraisal, for $90 an acre. Orion II, Pet. App. at A-12. In 1976, Orion rejected a purchase offer for $110 per acre from Nature Conservancy. In 1979, an appraisal by a private firm set an $80 per acre fair market value. In 1980, the State Department of Ecology offered to purchase the property for $100 an acre under a federal

estuarine sanctuary program. Orion refused that offer, and instituted this litigation. Orion II, Pet. App. at A-15 and A-16.

At no time, in the 25 years it has held these tidelands, has Orion applied for any local, state or federal license or permit to do anything with the property.

REASONS FOR DENYING THE WRIT

A. There Has Been No Final Judgment by the State Court.

This case is not final because the Washington Supreme Court has remanded this case back to the trial court to address "material factual issues . . . unresolved as to each component of the regulatory takings test . . . ." Orion II, Pet. App. at A-113. As a result of this remand, it is possible that the state courts may hold that an unconstitutional taking has occurred and that compensation may be awarded.

The remand is more than ministerial, and clearly covers more than purely state law questions. Rather, the remand will cover questions central to the federal constitutional issues in this case. Examples are: What uses of the property were permissible before and after governmental regulation? What decline in property value, if any, occurred as a result of the regulation? If a taking has occurred, what just compensation should be accorded? The answers to these questions are central to any review of the federal questions which may arise from this case. In short, in the words of this Court in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633 (1981):

> [F]urther proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore is not final, and we are without jurisdiction to review it.

There has, likewise, been no decision upholding the validity of a state statute such as would give rise to jurisdiction under 28 U.S.C. § 1257(2). Although the state court indicated that appropriate police power enactments, including the Shoreline Management Act (ch. 90.58 Wash. Rev. Code), normally are "insulated" from consideration as takings, it still left open the possibility that the Shoreline Management Act under the factual circumstances of this case may have resulted in an unconstitutional taking. The facial validity of that Act was simply not drawn into question, and there was thus no decision upholding its validity.

B. Issues of Material Fact Preclude Summary Judgment.

This case came to the state court upon an appeal from the trial court's rulings

upon cross motions for summary judgment. The state court held that several genuine issues of material fact exist, making summary judgment improper. Orion II, Pet. App. at A-6 and A-113. Summary judgment may be given only if there is no issue of material fact. Fountain v. Filson, 336 U.S. 681 (1949). It seems inappropriate for this Court to grant certiorari in a case where its first, and perhaps most important, analysis will be to review a complex record for the presence or absence of gaps or inconsistencies.

C. This Case Is Not Ripe for Review.

The state court's remand to address the questions of compensation leads to ripeness problems. In Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985), this Court noted that the "Fifth Amendment does not prescribe the taking of property; it prescribes taking without just

compensation." The compensation does not have to occur before the taking; rather, the Constitution is satisfied if the state provides a reasonable and adequate means for obtaining compensation after the taking. The state's action is thus not "complete" until the state fails to provide adequate compensation for the taking, 473 U.S. at 195. In Orion II, the state court remanded in part for a determination of the adequacy of compensation. State action is thus not complete and not ripe for review.

D. Orion Has Failed to Show a Decline in Its Property Value.

In Florida Rock Indus. v. United States, 791 F.2d 893 (Fed. Cir. 1986), the court noted, in reviewing the opinions of this Court:

> We doubt very much whether the Court ever meant to say, or would have said, that a denial of any immediately viable use must be a taking even though it had no

effect on the fair market value of the property.

In Goldblatt v. Hempstead, 369 U.S. 590 (1962), this Court held that appellants failed to state a takings claim when the record failed to show the loss, if any, which appellants would suffer as a result of the ordinance in question. The record in Orion II suffers from a similar defect. There is little or no evidence that suggests any decline in value of Orion's property as a result of any judicial, legislative or administrative activity.[2]

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[2]For instance, the State Board of Tax Appeals, after reviewing Orion's property transactions from 1964 through 1967, concluded that the Padilla Bay tracts held by Orion had a value of $50 per acre. In 1974, after the Washington Supreme Court's decision reiterating public navigational rights in Wilbour v. Gallagher, supra, and the enactment of the State Shoreline Management Act, a private appraiser valued this acreage at $90 per acre.

This is one gap in the record that may be filled if the state court's remand takes place, although the state believes it should have led to the dismissal of Orion's claim as was done in Goldblatt v. Hempstead, supra.

E. The State Court's Holding That Orion May Not Use Its Property Underlying Navigable Water so as to Substantially Impair Public Rights of Navigation and Fishing is Not a Departure From Precedent.

In Orion II, the state court held that "Orion had no right to make any use of its property that would impair the public rights of navigation and fishing, as well as the incidental rights and purposes recognized previously by this Court." Pet. App. at A-45. The "incidental rights" are those of "fishing, boating, swimming, water skiing, and other related recreational

purposes . . ." Pet. App. at A-44. Basically, the state court held that a tideland property owner could not fill a whole bay which had been used for navigation since the time of statehood. The public right recognized by the state court in Orion II and in earlier cases is a right of "navigation," and does not pertain to Orion's ability to exclude the public from its lands when they are not covered by water.

The state court's recognition of a public trust, or public navigational rights, far from being a sudden change in the common law, is supported by precedent running back to the turn of the century. Orion points to no cases, because there are none, in which the State of Washington has attempted to relinquish its ability and obligation to protect the public rights of navigation and fishery in waters seaward of

the inner harbor lines established in urban areas.

Twelve years after statehood, the Washington Supreme Court, in New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901), wrote:

> The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was, by the common law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the right surrendered by the constitution to the United States. The new states admitted

> into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. [Citations omitted.]

In the same opinion the court went on to describe the rights of the state in a navigable lake as "the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation." Id at 503, 64 Pac. at 738.

Three years later in Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 (1904), the Washington Supreme Court held:

> Being navigable water, when the state sold the bed thereof to the appellants, as stated in the finding No. 8, appellants took the title subject to the paramount right of the public to use the same for navigation. Watkins

> v. Dorris, supra, [24 Wash. 636, 64 Pac. 840] p. 644 [64 Pac. at 843]; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L.R.A. 190. The fact, therefore, that the title of the bed of the channel, or the land upon which an obstruction is placed, is vested in the appellants, does not confer upon them the right to obstruct navigation upon navigable water. It is no doubt true that the sovereign authority may control and regulate the use of navigable waters, but it does not follow that an individual, over whose lands such waters flow, may do the same. People v. St. Louis, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339. By the mere act of selling land to the appellants, the state conferred no right upon them to interfere with the rights of the public in the use of the highway. 34 Wash. at 274-75, 75 Pac. at 809.

See also the discussion of public rights in lands underlying navigable waters contained in Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915), quoting, with approval, from People v. California Fish Co., 166 Cal. 576, 584, 138 Pac. 79, 82 (1913) and Ward

v. Mulford, 32 Cal. 365, 372 (1867), as follows:

> Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned, ... 86 Wash. at 231, 149 Pac. at 952.

As previously discussed, the Washington Supreme Court continued to recognize public navigational rights in the 1969 case of Wilbour v. Gallagher, supra. Finally, in Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989 (1987), the court concluded with respect to the public trust doctrine:

> Although not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has

> always existed in the State of Washington. [107 Wn.2d at 670.]

The Washington State Constitution provides for a system of harbor lines within the navigable harbors of the state. Wash. Const., Art. 17, § 1. It has generally been held that tidelands inside the inner harbor line are treated as land. For instance, in Globe Mill Co. v. Bellingham Bay Improvement Co., 10 Wash. 458, 463, 38 Pac. 1112 (1895), the court stated:

> [T]he legislature, in proposing to dispose of the inner tide lands, under the provisions of the constitution in regard to harbor areas, acted on the supposition that all these tide lands are in the course of time to be converted into solid lands.

See Johnson & Cooney, Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters, 54 Wash. L. Rev. 275 (1979). Harris v. Hylebos Indus., Inc., 81 Wn.2d 770, 505 P.2d 457 (1973), relied on by

Orion, dealt with tidelands inside the inner harbor line.

The fact that the state allows filling in harbor areas as an aid to navigation is not inconsistent with the recognition of a public trust, or public right of navigation in the rest of its navigable waters. The same thing was encouraged by this Court in Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892).

It is perhaps impossible to survey any extensive body of caselaw spanning nearly one hundred years and find that all of the cases are perfectly consistent with each other. But that is not what Justice Stewart was concerned about in Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring); Justice Stewart reasoned that "a sudden change in state law, unpredictable in terms of the relevant precedents" could work a taking. Here the

state court's decisions are clearly grounded in precedent.

CONCLUSION

Orion is asking the Court to accept an interlocutory appeal in a case where the state courts have not reached a final decision on any of the federal questions involved. The state courts have yet to determine whether or not a taking of property without just compensation has occurred, or whether compensation should be provided. The state court has reached decisions on some components of those questions, but it seems pointless to review those decisions until the final outcome is reached in the state courts. After all, this case changed significantly from Orion I (Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 [1985]) to Orion II. It could change again.

The Court should also reject Orion's suggestion that the Court review the history of Washington law pertaining to tidelands. States have always enjoyed wide latitude in shaping their own laws with respect to navigable waters. See Shively v. Bowlby, 152 U.S. 1 (1894). The state court's decision in Orion II is clearly within the ambit of state and national precedent.

Finally, it should be recalled that this case arose on cross motions for summary judgment and that the state court concluded that "several genuine issues of material fact exist, making summary judgement improper." Orion II, App. at A-6. It would be unusual for this Court to review a "takings" case when important facts, such as the property values at any relevant time, have not been resolved in the state judiciary.

The State of Washington submits that the Petition for Writ of Certiorari under this Docket should be denied.

Dated: May 5, 1988.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Supreme Court Rule No. 36 1

No. 87-1575

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner, the Orion Corporation (Orion). Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

This case involves a surprising reversal of state law which seriously erodes vested property rights in tidelands long ago conveyed by the state to private owners. These conveyances were seen as serving the public interest by opening the lands for private development and increasing the state's tax base. The Washington Supreme Court for years has held that such tidelands are owned in fee simple absolute and free of any public trust claims. By the opinion below, however, these tidelands are now declared to be subject to a public trust and thus devoted to public purpose and use. Acquisition for public use has been achieved by judicial fiat.

Amicus believes the opinion below poses a serious threat to the integrity of the individual right of property by violating constitutional prohibitions against the taking of property without compensation as well as due process guarantees. The result violates fundamental notions of fairness and equity.

STATEMENT OF THE CASE

When the State of Washington was admitted to the Union, it took title under the Equal Footing Doctrine to the beds of navigable waters in the state including tidelands up to the mean high tide line. This case involves such tidelands. They are located on Padilla Bay which is part of Puget Sound.

Many years ago, the State of Washington decided that it would be in the overall public interest to convey tidelands into private ownership including those now owned by Orion.[1] There was no thought that such lands should be preserved in their natural state.[2]

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1 "From its first session, the Washington State Legislature passed numerous laws for the purpose of encouraging the development of certain tidelands by lessees and purchasers thereof." *Harris v. Hylebos Industries, Inc.*, 81 Wash. 2d 770, 776, 505 P.2d 457, 461 (1973).

2 "The notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood." *Harris*, 81 Wash. 2d at 776, 505 P.2d at 461.

Indeed, such conveyances were seen as opening land for improvement and development thus attracting private capital, enhancing the economic resources of the state, and increasing the state's tax base.[3] This matter was even specifically addressed at the Washington Constitutional Convention in 1889. It was there concluded that the state's best interests would be served by looking to private investment and development of the state's tidelands provided that harbor areas would never be conveyed away.[4] Since such lands were subject to the ebb and flow of the tides, their reclamation by diking and filling was encouraged. As stated by the Washington Supreme Court below:

> "We acknowledge that during the early part of the 20th century, state policy included the widespread sale of tideland property and the encouragement of diking and filling." *Orion Corporation v. State*, 109 Wash. 2d

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[3] "[I]t had been the policy of this state and the practice of its commissioner of public lands to encourage the improvement and development of state tidelands by private capital and industry." *Boyer v. State*, 19 Wash. 2d 134, 140, 142 P.2d 250, 254 (1943).

[4] *See, e.g., State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913):

> "Those who sat in the constitutional convention, and those who met in our early legislative assemblies, were confronted with an important problem when treating the subject of tide and shore lands. Many insisted that the state should reserve title and that the land should never be sold. Others maintained that the best interests of the state demanded that they pass into private ownership, thus becoming a subject of taxation and revenue to the state. The latter theory prevailed, subject to the qualification that the harbor area should never be disposed of. The state has invited investment in these lands upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes."

621, 639, 747 P.2d 1062, 1072 (1987), appendix to petition (App.) at A-39, 40.

Many such conveyed tidelands were filled and developed. Some, of course, were not. But the latter were nevertheless held by their owners, and bought and sold, in the full expectation that they were owned in fee simple absolute free of any retained state claim. Prior Washington Supreme Court cases unequivocally upheld the right of the state to convey tide and shore lands so as to afford grantees with the right of exclusive possession and enjoyment unencumbered by any public trust claim.

Thus, in *Palmer v. Peterson,* 56 Wash. 74, 75-76, 105 P. 179, 180 (1909), a case also involving Puget Sound tidelands, the court ruled:

> "It is lastly contended that inasmuch as the tide lands in controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted, if such a grant was within the competency of the state, and that such a grant was within the competency of the state cannot, at this late day, be controverted."

See also Puget Mill Company v. State of Washington, 93 Wash. 128, 160 P. 310 (1916), where it was argued that shore lands adjacent to Lake Washington were under navigable waters at the time of their sale and were therefore held in trust for the people of the state for purposes of navigation and commerce. It was thus asserted that

such lands could not be disposed of so as to vest absolute title in private parties. The Washington Supreme Court rejected this argument stating:

> "It seems to us that this contention cannot be sustained in the light of the history of the state's policy since admission to the Union and the decisions of this court. . . . Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form as these deeds are, upon which are rested the titles of the plaintiffs. The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands." 93 Wash. at 134-35, 160 P. at 312-13.

Moreover, such conveyances were not seen as substantially impairing the public's right of navigation, commerce, and fishing. First of all, the state provided means for defining and locating harbor areas along the shores of navigable waters to accommodate needed commerce. Procedures were adopted for identifying and making certain the location of such harbor areas which would thus be treated separately from those tide and shore land areas which would be conveyed into private ownership.[5] Secondly, sales of tidelands, such as those in Padilla Bay,

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[5] "It is true that, by the limitations prescribed by article 15 of our constitution, the state authorities are prohibited from disposing of and vesting in absolute private ownership the lands of the state lying under navigable waters which shall be established as harbor areas; but it is also true that the same article of our constitution provides that the location of such harbor areas along the shores of navigable waters

(Continued on following page)

though perhaps excluding some minor type of public boating during times of high tide, were not considered as a substantial impairment to the public's use of the navigable waters. *Palmer*, 56 Wash. at 75-76, 105 P. at 180. This, of course, is readily understandable when one considers the overall size and extent of Puget Sound. It is thus not surprising that such deeds were seen as absolute in nature and as authorizing the exclusion of members of the public who might otherwise seek to use such waters. *Id.*

In short, under established Washington law, *tidelands were treated as land and not as navigable waters.* They were conveyed into private ownership on that basis. This point was made clear in *Harris v. Hylebos Industries, Inc.*, 81 Wash. 2d 770, 505 P.2d 457. There the court distinguished the earlier case of *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969). In *Wilbour*, the court took judicial notice that a lake was navigable and that it was used by the public for recreational purposes. The court, in *Wilbour*, held that the public had the right to use the entire surface of the lake and that the defendants had no right to encroach thereon with fill obstructing this use in the absence of some governmental authorization to do so. In *Harris*, the court held that *Wilbour* had no application to tidelands which had previously been conveyed by the state. The court stated:

(Continued from previous page)

shall be determined and established by a commission appointed for that purpose, thus rendering certain the line dividing shore lands which may be disposed of and vested in absolute private ownership from the lands within harbor areas which cannot be lawfully so disposed of." *Puget Mill Company v. State of Washington*, 93 Wash. at 134, 160 P. at 312-13.

> "As the opinion will reveal, none of the cases cited herein pertaining to the legal status of tidelands deeded to private individuals by the state were considered pertinent to the question before the court in [*Wilbour*]. The obvious reason is that such tidelands, as we have heretofore pointed out, *have never been classified by the state as navigable waters, but rather have been treated as land.* Particularly, where such lands lie in city harbors, as here, they have been regarded as most suitable for reclamation and for dedication to the purposes of commerce and industry." 81 Wash. 2d at 785-86, 505 P.2d at 466 (emphasis added).

Times have changed!

The State of Washington now wants to retroactively undo what it has done in the past. The reason for the judicial creativity which underlies the opinion below can be simply stated. The facts are fully documented in Orion's petition.

Many tidelands (at least those not previously filled and developed) are today seen as an important environmental resource. This includes those owned by Orion. At first, consideration was given to the possibility of acquiring such lands by eminent domain. It was then decided that the state's objectives could be achieved by regulation. This, however, gave rise to the potential that such regulation might be held to go too far and would thus constitute a taking for which compensation would have to be paid. This litigation was commenced to challenge such regulation. But the final solution to the state's dilemma was not really achieved until the Washington Supreme Court, in its holding below, concluded, contrary to the law in effect when Orion purchased its property, that the lands

Orion purchased have always been subject to a public trust. The court held that it was beyond the power of the state to relinquish the trust. *Orion,* 109 Wash. 2d at 639, 747 P.2d at 1062, App. at A-40.

The Washington Supreme Court thus concluded that any analysis of the effect of the state's regulatory actions would have to be based on the premise that Orion's lands are already subject to what is in effect an easement for public purposes. The court also expressly recognized that it had "extended the doctrine beyond its navigational aspects." *Id.* at 641, 747 P.2d at 1073, App. at A-44. The court said:

> "The public trust doctrine resembles 'a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'" *Id.* at 640, 747 P.2d at 1072-73, App. at A-42.[6]

But even with respect to navigation, the court completely reversed its earlier holdings which treated such property as land and not as navigable waters. Although the earlier cases upheld the right of the property owners to exclude members of the public, the court now holds that Orion has no right to make any use of its property which would impair the public's right of navigation and fishing thereon. *Orion,* 109 Wash. 2d at 641, 747 P. 2d at 1073, App. at A-45. Thus the right to exclude the public, previously recognized, is declared to no longer exist.

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[6] Compare *State v. Sturtevant,* 76 Wash. at 165, 135 P. at 1037, where the court stated:

> "The only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation."

SUMMARY OF THE ARGUMENT

This amicus brief will not address issues of whether the state's *regulatory schemes* go so far as to constitute a taking. This brief addresses solely the question of whether the Washington Supreme Court can, by judicial fiat, impose a public trust easement upon Orion's lands. The question addressed is whether a state court can, consistent with the requirements of the Fifth and Fourteenth Amendments to the United States Constitution, retroactively declare that a public right in private property exists where no such right existed under the laws of the state when the property was originally conveyed or, for that matter, when it was acquired by Orion. Fundamental issues of fairness and equity obviously are involved.

This Court recently considered the public trust doctrine in *Phillips Petroleum Company v. Mississippi*, — U.S. —, 56 U.S.L.W. 4143 (Feb. 23, 1988). There the dissent criticized extension of the doctrine observing that conveyances of such lands to private parties could be stricken down by the states if state law permits. 56 U.S.L.W. at 4150. The majority opinion, however, pursued an analysis based on "reasonable expectations in property interests" and found that unequivocable statements in earlier Mississippi cases provided ample indication of the state's public trust claim. 56 U.S.L.W. at 4147. The majority responded to the dissent by stating that the decision "does nothing to affect ownership rights in States which previously relinquished a public trust claim to tidelands." *Id.* The majority further noted that each state had the right to dispose of such lands "according to its

own views of justice and policy'' (quoting *Shively v. Bowlby,* 152 U.S. 1, 26 (1894)). *Id.*

The question now presented is whether a state can adopt a policy of conveying such lands free of any public trust, can create the sort of ''reasonable expectations'' alluded to by the majority in *Phillips Petroleum,* and can then change its mind and reclaim that which it had earlier conveyed away.

This amicus brief will argue the following points: First, the right of a state to dispose of its tidelands, and to convey such lands unencumbered by a public trust if this is seen to best serve the public interest, is a matter of state law; second, the State of Washington, having conveyed the tidelands herein free of any public trust claim, may not, at this late date, assert such a claim; and third, the decision of the Washington Supreme Court below is final and thus the case is ripe for review by this Court.

Important issues are presented which should be addressed by this Court. If the Washington Supreme Court can retroactively impress a public trust easement on property previously held to be free of any such easement, other states can do the same. By declaring these tidelands to now be open to public entry and use, the Washington Supreme Court has accomplished precisely that which was denounced with reference to the Kuapa Pond in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Moreover, the reasonable expectations of the property owners, an apparent critical consideration in *Phillips Petroleum,* will have been seriously interfered with.

As observed by Justice Brennan in *Nollan v. California Coastal Commission*, 483 U.S. —, 97 L. Ed. 2d 677, 696 (1987) (Brennan, J., dissenting):

> "Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose."

———o———

ARGUMENT

I

THE STATES HAVE BEEN FREE TO DETERMINE, AS A MATTER OF STATE LAW, THE MANNER OF TIDELAND DISPOSITION

This Court has consistently held that a state is free to dispose of its sovereign lands, acquired with respect to navigable waters, "in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states. . . ." *Weber v. State Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 66 (1873); *Shively*, 152 U.S. 1; *Hardin v. Jordan*, 140 U.S. 371, 382-83 (1891); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 374-75 (1977). The states have thus been free to relinquish any claim to such lands consistent with the federal navigational servitude. *Oregon ex rel. State Land Board*, 429 U.S. at 375; *Barney v. City of Keokuk*, 95 U.S. 324 (1877). In *Barney*, the Court said that if the states choose to resign to others "rights which

properly belong to them in their sovereign capacity, it is not for others to raise objections." *Id.* at 338.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), is often said to stand for the proposition that the states have not been free to convey such lands free of a public trust. *Illinois Central* stands for no such proposition and nothing in *Illinois Central* is inconsistent with the reasoning of the numerous cases cited above.

Unlike the conveyancing procedures adopted by the State of Washington, which affected tide and shore lands, and which specifically provided for the retention of harbor areas, the Illinois legislature, in *Illinois Central*, had attempted to convey the *permanently submerged bed* of Lake Michigan placing under control of the railroad company all of the natural harbor area adjacent to downtown Chicago.

In discussing the public trust, this Court said:

> "The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.*" *Id.* at 453 (emphasis added).

Indeed, this Court in *Illinois Central* specifically recognized the right of the respective states to dispose of sovereign lands "when that can be done without substantial impairment of the interest of the public in waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." *Id.* at 435.

In *Palmer*, 56 Wash. at 76, 105 P. at 180, the Washington Supreme Court specifically considered the effect of

Illinois Central on Washington's tideland conveyances. After quoting the above language, the Washington court concluded:

> "The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states."

Palmer thus held that a state deed, absolute in form, "carries with it the right to exclusive possession and enjoyment of the lands granted." *Id.*

Illinois Central must also be read in light of this Court's later decision in *Appleby v. New York*, 271 U.S. 364 (1925). There the issue was the power of the state and the City of New York to part with property under navigable waters, free of subsequent regulatory control. *Id.* at 380. The Court held that the matter was one of *state law*, and concluded that the grantees were vested with fee simple title, that the state and city had parted with both "the jus publicum and the jus privatum," and further that the city could only be revested with its prior rights "by a condemnation of the rights granted." *Id.* at 399. The conclusion in *Illinois Central*, which was viewed as "a statement of Illinois law," *id.* at 395, was distinguished on the basis that there the conveyance embraced the entire Chicago harbor and "adjoining submerged lands which would in all probability be thereafter included in the harbor." *Id.* at 393.

In short, *Appleby* clearly upholds the authority of the State of Washington, authority which it previously

exercised, to dispose of tidelands in a manner unencumbered by the public trust.

II

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF ORION'S PROPERTY WITHOUT JUST COMPENSATION

The court below has determined that Orion's property is subject to a public trust easement. While the full scope of the easement was not defined, the property owner's right to exclude members of the public is now denied. The court said that the trust is both for the benefit of the public and the land's dependent wildlife. *Orion,* 109 Wash. 2d at 640, 747 P.2d at 1072-73, App. at A-42. The court also said that the trust goes beyond traditional "navigational aspects" and includes fishing, swimming, water skiing, and other related recreational purposes. 109 Wash. at 641, 747 P.2d at 1073, App. at A-44. The owner's right of use was held to be restricted to uses which would not substantially impair "public rights" under the trust and this restriction on Orion's right to its own use of the property was justified because a "property right must exist before it can be taken." 109 Wash. at 641, 747 P.2d at 1073, App. at A-45-46.

As observed by this Court in *Summa Corporation v. California ex rel. State Lands Commission,* 466 U.S. 198, 205 (1984), such an owner is left with little more than "a naked fee."

Considered in light of relevant Washington precedents, it is clear that the court's action, if allowed to stand, would violate Orion's due process rights and would result in a

taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

As stated in *Puget Mill Company v. State of Washington*, 93 Wash. at 135, 160 P. at 313:

> "We conclude, then, that the plaintiffs acquired absolute fee simple title to these added shore lands, as they did to the shore lands existing at the time of the execution of the deeds therefor by the state.
>
> "Now this being the nature of the plaintiffs' titles, *it is elementary constitutional law that such titles cannot be impaired by any act of the state after making the deeds upon which they rest.*" (Emphasis added.)

Since the Takings Clause addresses the state *as an entity*, it follows that the act of the Washington Supreme Court, in the decision below, "is to be deemed the act of the state" within the meaning of the Fourteenth Amendment. *Chicago, Burlington, and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

As stated in *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring):

> "To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court."

See also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *cert. granted and remanded on other grounds*, 477 U.S. 902 (1986). There, the Ninth Circuit observed that a state may change its laws by judicial decree as well as by legislative action. *Robinson*, 753 F.2d at 1474. But, the Court held that rights recognized under prior state law concepts cannot constitutionally be altered by simply announcing new concepts. *Id.* Relying on *Hughes*, the court held that such rights cannot be divested without payment of just compensation. *Id.* "New law, however, cannot divest rights that were vested before the court announced the new law." *Id.*

III

THIS CASE IS RIPE FOR REVIEW

This Court granted certiorari in *Robinson v. Ariyoshi* and remanded the case for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Robinson*, 477 U.S. 902. This was done at the urging of the Solicitor General who argued that subsequently certified questions to the Supreme Court of Hawaii made it clear that its decision was not a final determination of the issue presented.[7]

Such is not the case here. The Washington Supreme Court has held, in no uncertain terms, that Orion's lands are now subject to a public trust and open for public use.

Assuming, as this amicus believes must be assumed, that the effect of the decision is to transfer a property

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[7] See Brief for the United States as Amicus Curiae, No. 85-406 at 1-2, 20.

interest to the public in and to lands previously held in fee simple absolute, ripeness considerations are simply not present. *Williamson County* involved the application of various zoning regulations and hence presented a *regulatory* taking issue of whether the regulations went "too far." It had to first be determined how far the regulations went before it could be determined whether they went too far. *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).[8]

The public trust issue addressed here, however, does not involve *administrative zoning regulation*. Instead, it involves a *final judicial determination* subjecting Orion's property to an expansive public trust.

An easement for public use has been impressed upon the property. The public is invited to enter. Property impacts, and issues of remaining economically viable use, are thus irrelevant to the question of whether a taking has occurred. As stated in *Nollan v. California Coastal Commission*, 97 L. Ed. 2d at 685:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking."

That is precisely what the Washington Supreme Court has done in this case.

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[8] Even with respect to the regulatory taking aspects of the decision below, it should be noted that the Washington Supreme Court has twice concluded that any permit application would be futile and hence that the regulatory taking claims are ripe for review. *Orion*, 109 Wash. 2d at 632-33, 747 P.2d at 1068-69, App. at A-22-25.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: April, 1988.

Respectfully submitted,

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No. 87-1575

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE ORION CORPORATION,

Petitioner,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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THE ORION CORPORATION,*

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Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON**

The State of Washington, answering on behalf of itself and Skagit County, asks this Court to deny The Orion Corporation's Petition for Certiorari. The State contends that the facts in this case and the law of the State of Washington remain, after these six years of litigation, unsettled and that this Court, accordingly, should be loathe to interfere with the state proceedings. On the contrary, the State Court has settled the facts and law by issuing final decisions on federal questions before it. If the Court grants the State's request,

* The Orion Corporation has no parent or subsidiaries. Its only affiliate is the Padilla Bay Associates.

** Because the State requested and received additional time to file its responsive brief, only a draft of the State's brief was available to Orion when Orion prepared this reply brief.

nothing can be served below but further economic mischief and unjust delay.[1]

The settled law and facts include the following:

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[1] (a) For example, the State indicates that, of the 9,100 acres Orion owns or controls, 225 acres are held subject to a reversionary clause requiring that the lands be used for oystering. The State's point here is unclear. First, if Washington had had a public trust doctrine, such clauses would have been superfluous. Second, when Orion was acquiring its tidelands, the State was selling these reversionary rights. Had Washington had a public trust doctrine, the State could not have sold such rights. (In 1968, the State appraised its reversionary rights in these 225 acres at $221 per acre and offered to sell the rights to Orion at that price. The State, in 1968, valued even the reversionary rights at far greater than the amount it offered Orion in 1980 for the entire fee under its "willing seller" concept. Orion rejected this State attempt to avoid paying just compensation.)

(b) The State also points out, without noting its relevance, that Orion never wholly completed the "nightmarish" task of assembling the hundreds of tracts in Padilla Bay before the State imposed its moratorium. It did, however, assemble 9,100 acres, resulting in some large blocks of property by 1969. Had the State not interfered, Orion would have acquired more acres. Orion certainly acquired more acres lawfully than the State managed to acquire, with its unlawful "willing seller" approach, for the Sanctuary.

(c) Similarly, the State complains that Orion never applied for a Corps of Engineers permit. This issue, too, has been settled. First, the moratorium was imposed before Orion had reached the permit stage for its project. Second, as the State Court found in *Orion Corp.* v. *State*, 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("*Orion I*"), the Corps would have denied a permit after 1969 because it would have, by regulation, deferred to the State. App. B-22.

(d) Finally, the State complains that, in the 25 years since Orion started acquiring its property, Orion has not applied for any permit. First, the State froze the property before Orion reached the permit application stage. State officials, including the director of the State Department of Ecology, have so recognized. Second, the State Court has twice validated Orion's opinion that applying for a permit would have been, in view of state regulations and the State's "conscious policy choice" to preserve Padilla Bay in its natural state, a vain and futile act. Again, however, the State's attempt to unsettle the record should not earn it more years of delay.

— The State of Washington sold state tidelands so they would be developed and put to useful purposes. *E.g., State* v. *Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913). The State of Washington conveyed these tidelands into absolute fee ownership. *Puget Mill Co.* v. *State*, 93 Wash. 128, 134-36, 160 P. 310, 313 (1916). "Orion's property . . . had originally been sold as unzoned tidelands for commercial development." *Orion Corp.* v. *State*, 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("*Orion I*"), App. B-19.

— The State of Washington, as a "settled policy," promoted reclamation and development of private tidelands. *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 776, 505 P.2d 457, 460 (1973); *Boyer* v. *State*, 19 Wash. 2d 134, 140-42, 142 P.2d 250, 254 (1943). The State Court upheld the right to reclaim Padilla Bay — and other rural tidelands — through the use of the State diking and reclamation statute. *Jones* v. *Hammer*, 143 Wash. 525, 530-31, 255 P. 955, 958 (1927). When Orion began acquiring its tidelands in the early 1960's, the State favored an industrial use of Padilla Bay. *See* Petition at 5. Skagit County zoned a portion of Padilla Bay "industrial." *Id.*

— In 1969, after Orion had completed extensive engineering and feasibility studies, the State imposed a temporary moratorium on tideland development. *Orion Corp.* v. *State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987) ("*Orion II*"), App. A-10. In 1971, the State enacted the Shoreline Management Act, Wash. Rev. Code ch. 90.58 ("SMA"). Thereafter, the State pursued a "conscious policy choice" to preserve Orion's property in its natural state. *Orion I*, App. B-37.

— That "conscious policy choice" came to complete fruition on August 29, 1980, through the establishment, "in perpetuity," of the 11,600-acre Padilla Bay National Estuarine Sanctuary (the "Sanctuary"). The Sanctuary "is the

final and determinative land use program that directly impacts Orion's property." *Orion I*, App. B-23. The State included all of the 9,100 acres owned or controlled by Orion in the Sanctuary, but refused to condemn the property for this "public enterprise." Orion was forced to sue to establish the taking of its property.

— At least since 1980, Orion has been unable to obtain a permit for any economic use of its property. And the State Court has twice so held. *Orion II*, App. A-25; *Orion I*, App. B-44-45.

— In December 1987, the State Court held that Orion, from the outset, had had no substantial rights in its property. Rather, the State, the State Court held for the first time, sold the property subject to a public trust. This public trust grants the public a right to use Orion's property for navigation, fisheries, recreation, and other public needs as modern science is able to identify them. *Orion II*, App. A-43-44. Finally, in espousing its "insulation" doctrine, the Court also held: "[T]he SMA and SCSMMP [State and County shoreline regulations Orion has challenged] qualified as a public health and safety regulation, insulated from characterization as a taking, and thus subject to challenge only under substantive due process." *Id.* at A-91-92.

As the foregoing indicates, the record necessary to address the federal issues is settled.

ARGUMENT

1. THE PUBLIC TRUST DECISION.

The State argues that, because Washington purportedly has inconsistent cases on the public trust, *Orion II* cannot be a sudden departure from precedent. Brief at 24.

Accordingly, the State continues, this Court should not meddle with Washington law.

To support its position, the State ignores, as the State Court did, the controlling authority flatly repudiating a public trust over Washington's tidelands. *E.g., Puget Mill Co.* v. *State*, 93 Wash. 128, 160 P. 310 (1916). It relies, instead, primarily on authority that has been distinguished, discredited, or overruled. For example, the State relies on *New Whatcom* v. *Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901). As more fully argued in Orion's Petition, however, *New Whatcom* was neither a tideland nor shoreland case nor one addressing navigability, but rather a case involving riparian rights in a small, non-navigable stream. The *New Whatcom* court itself distinguished *New Whatcom* from tideland cases. *See* Petition at 20.

The State also points to *Dawson* v. *McMillan*, 34 Wash. 269, 75 P. 807 (1904). In *Dawson*, the State Court refused to allow the blocking of a channel that had been used for commercial navigation. The State Court later distinguished the case, questioning even whether the plaintiff was really a tideland owner and noting that "the plaintiff was not in fact given the right to cross the tidelands of the defendant to reach the navigable channel, but only to traverse the channel itself." *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 780, 505 P.2d 457 (1973).

These and other cases were criticized by both the State Court and this Court. "[T]hese cases must be regarded as incorrectly stating the principle involved rather than as authority." *Lownsdale* v. *Grays Harbor Boom Co.*, 54 Wash. 542, 551, 103 P. 833 (1909); *accord*, *Port of Seattle* v. *Oregon & Washington Railroad Co.*, 255 U.S. 56, 64 n.4 (1921). At least by 1915, the State Court could write:

> *Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form* as these deeds are, upon which are rested the titles of the plaintiffs. *The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands.*

Puget Mill Co. v. *State*, 93 Wash. 128, 134-35, 160 P. 310, 313 (1916), emphasis by Court in *Harris* v. *Hylebos Industries, Inc.*, 81 Wash. 2d 770, 775-76, 505 P.2d 457, 461 (1973).

The State seeks to escape liability for the public trust servitude now granted the public over Orion's lands on the basis that the State Court may have many decades ago strayed from settled authority. The State should heed this elementary principle of life and law: Two wrongs do not make a right.[2]

2. FINALITY OF THE STATE COURT'S DECISIONS.

This Court may review final decisions of a state's highest court "where any title, right, privilege or immunity

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[2] The State contends that "Orion points to no cases, because there are none, in which the State of Washington has attempted to relinquish its ability and obligation to protect the public rights of navigation and fishery in waters seaward of the inner harbor lines established in urban areas." Brief at 18-19. To the extent that this statement is comprehensible, it is both remarkable and wrong. *See generally* Petition at 12-21. The State for years promoted the diking and reclamation of tidelands, including rural tidelands. *E.g.*, *Jones* v. *Hammer*, 143 Wash. 525, 255 P. 955 (1927) (diking and reclamation statutes [like other tideland improvement statutes] are applicable to rural tidelands, here Padilla Bay).

is . . . claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(3). The decisions in *Orion II*, which deny Orion its constitutional property rights, are "final" within the meaning of Title 28 U.S.C. § 1257.

This Court has in certain circumstances treated a state decision on a federal issue "as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975), and cases cited therein. One circumstance in which this Court has done so is when "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. *See, e.g., New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U.S. 362 (1914); *Wheeling & Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287 (1891). In this situation, "immediate rather than delayed review [may] be the best way to avoid 'the mischief of economic waste and of delayed justice.' " *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945)).

For example, in *New York* v. *Cathedral Academy*, this Court reviewed a state decision upholding the constitutionality of a statute that authorized reimbursement to nonpublic schools for state-mandated recordkeeping and testing services. Although the case was remanded for determination of the amount due the plaintiff, this Court concluded that:

> [N]o possible developments on remand could sufficiently minimize the risk of future constitutional

> harm. . . . Since further proceedings cannot remove or otherwise affect this threshold federal issue, the Court of Appeals' decision, is final for purposes of review in this Court.

434 U.S. at 128 n.4.

In the case at bar, the State Court has finally determined that (1) Orion's property is subject to a public trust, (2) the State, in establishing and operating the Sanctuary, did not take Orion's property by invasion, (3) the state shoreline regulations are insulated from Orion's regulatory taking claim, and (4) the State will not recognize a cause of action for oppressive pre-acquisition conduct. As in the cases cited above, developments on remand will not affect these federal constitutional issues. Even if the trial court determines that a regulatory taking has occurred,[3] and awards compensation on this basis, these federal issues "will survive and require decision."

Moreover, the issues on remand cannot be decided correctly prior to final disposition of the federal constitutional issues by this Court. The trial court's determination whether a taking has occurred and, if so, of the amount of compensation due to Orion as a result of the taking is directly dependent on this Court's determinations whether the public trust doctrine applies, whether the State took Orion's property by invasion, and whether the State is subject to a regulatory taking claim.

Thus, if Orion must await the completion of the additional state court proceedings before seeking review by this Court, and this Court subsequently reverses the decisions in

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[3] How a regulatory taking could have occurred under the reasoning of *Orion II* is unclear. The State Court has ruled that the shoreline regulations are "insulated" from a takings challenge, and may be attacked only on substantive due process grounds. App. A-91-92.

Orion II, the lower court proceedings will all be for naught. All decisions made by the lower court will have to be reconsidered in further state proceedings. Accordingly, the delay of review, pending completion of the state court proceedings, will result in substantial "economic waste."

Moreover, denial of immediate review of *Orion II* will result in "delayed justice" by depriving Orion of its constitutional property rights until completion of the state court proceedings. The Washington Court has made a final determination that the public has the right to use Orion's property. Without immediate review, this unconstitutional invasion of Orion's property under the public trust decision and by the Sanctuary will continue for the entire duration of the additional state proceedings. To prevent this unnecessary delay of justice, *Orion II* must be deemed a final decision subject to immediate review by this Court. *See National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43 (1977) (Illinois Supreme Court's denial of a stay of an injunction, pending appeal on the merits, was deemed final for purposes of review by this Court because it could deprive petitioners of first amendment rights during the period of appellate review).

3. RIPENESS FOR REVIEW.

The State has argued, based on *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), that the State Court's decisions in *Orion II* are not ripe for review because Orion has not been denied just compensation for the taking of its property. In *Williamson*, however, this Court determined that the State had provided the petitioner with an adequate procedure for seeking just compensation for the alleged regulatory taking of its property. *Id.* at 194-97.

In the case at bar, in contrast, Orion does not have an adequate state procedure for seeking just compensation for the taking of its property. The State Court has already finally decided that the public trust doctrine applies retroactively to Orion's property and that no taking by invasion has occurred. Therefore, even if a regulatory taking is found, any award of compensation will not include the value of the expansive easement taken by the public trust decision. Hence, Orion cannot obtain just compensation for the taking of its property unless and until this Court reviews and reverses the State Court's decisions on the issues of public trust and taking by invasion. Accordingly, these decisions are ripe for review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a Writ of Certiorari.

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